Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1999

No.: 99-

ESTATE OF CLYDE L. RINALDI,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES AND APPENDIX

GEORGE W. ERICKSEN, ESQUIRE
Counsel
POST OFFICE BOX 172238
TAMPA, FLORIDA 33672
(813)223-7803
(813)221-8106 - FAX
FLORIDA BAR NO.: 022873

QUESTIONS PRESENTED

1. Application of the Constitutional Doctrine of Separation of Government Functions. The case presented the unusual situation where the Treasury Department authorizes a taxpayer to present a direct application to the Treasury Department for a tax-right with collateral respect to an event already under consideration by the United States Court of Claims, but involving a new set of legal conditions. The Petitioner contends that the Treasury Department maintain its jurisdiction until it has made its administrative decision. The Court has no authority to intervene until the Treasury Department's administration decision has been entered.

2. Ignoring Factual Issues in Summary Judgment Case. The Trial Judge decided this cross-summary judgment case in his Court on a basis which ignored essential disputed facts. The Department of Justice Brief completely ignored the existence of such facts, which included the blindness of the decedent-testator. The Court of Appeals for the Federal Circuit followed the issue as presented solely by the Defendant's representatives, the Department of Justice.

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No.: 99-

ESTATE OF CLYDE L. RINALDI,
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v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES AND APPENDIX

The Plaintiff-Appellant, Estate of Clyde L. Rinaldi, Deceased, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeals for the Federal Circuit dated in the above entered proceeding on November 13, 1998, and previous proceedings, as hereinafter referred to.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit is attached hereto, page A-69, Appendix.

The Opinion of the United States Court of Federal Claims is presented in the Appendix hereto, page A-1, with corrections to that Opinion presented in the Appendix hereto, page A-24.

The Judgment of the United States Court of Federal Claims issued pursuant to its Opinion as filed December 31, 1997, is presented in the Appendix hereto, page A-26.

Order of the United States Court of Federal Claims denying Plaintiff's Motion for Relief of Judgment and further relief under the provisions of Rule 60 (B) (1), Appendix page A-59.

JURISDICTION

Petitioner requests review of a judgment and opinion of the Court of Appeals for the Federal Circuit, and of an Order considered final of United States Court of Federal Claims denying relief under Rule 60 (B) (1) of that Court. Title 28 USC §1254 gives jurisdiction to this Court to review through grant of Petition for Certiorari.

In the instant case, the general federal questions involve a right to refund of Federal Estate Taxes received by the Internal Revenue Service; and in one of the questions presented the case is complicated by a change in the legal position of that Federal Agency subsequent to the Judgment of the United States Court of Federal Claims, and subsequent to the Appeal of that Judgment to the Court of Appeals for the Federal Circuit. The change of position also, in the opinion of the Plaintiff, offered a new option to the plaintiff for relief, which consequently raised the constitutional question of separation of powers, to be argued in this proceeding.

UNITED STATES FEDERAL RULES, REGULATIONS, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED; FLORIDA STATUTES

Rule 56 of the Rules of the United States Court of Federal Claims is substantially the same as Rule 56 of the Federal Rules of Civil Procedures.

Rule 60 of the Rules of the United States Court of Federal Claims is substantially the same as Rule 60 of the Federal Rules of Civil Procedure. Rule 60.1 of the Rules of the United States Court of Federal Claims provides a method of remand to the Administrative Department for any problems properly in the jurisdiction of non-judicial executive decision-making.

The Federal Statute involved is 26 Internal Revenue Code of 1986 §2056 (b) (7) and its associated Section of the I.R.S. Regulations, Section 20.2056 (b)-7(d) (3) (ii).

A subject significantly ignored by the Department of Justice and the Courts involved is the legal method of establishing the intention of the tes-

tator in his understanding of the provisions of the will; but we do not believe that the details of that controversy are necessarily as significant as those specified.

Consequently, the fact that the United States Court of Federal Claims is a Title I Court is of some significance, although it operates in all important respects as though it were in all practical aspects a complete replacement in all particulars of its predecessor, a Title III Court, and so considers itself. See Howard v. U.S., 31 Fed Cl 297, 307 (1998).

STATEMENT OF THE CASE

While the statement of the case made by Judge Weise in the Court of Federal Claims ignored some important facts and erroneously states others, it is generally accurate. It is copied here with certain notations of correction which appear elsewhere as noted.

From the Opinion: (Appendix, A-1)

> "The decedent, Clyde L. Rinaldi, died testate on November 25, 1988, survived by his wife, Nelle M. Rinaldi, his son, William S. Rinaldi, Sr., and several grandchildren. His will was admitted to probate on December 21, 1988. Rinaldi's wife and son were nominated under the will and qualified by the local probate court to serve as co-personal representatives of the estate.
>
> 'Rinaldi served for many years as the chief executive officer of the Rinaldi Printing Company. The printing company was founded in 1905 by Rinaldi's father, and was incorporated in 1963 under the laws of Florida. On March 14, 1983, when the will was executed, Rinaldi's son served as the company's chief executive officer, while Rinaldi served as the director. At that time – and on the date of his death as well – Rinaldi owned 52.06 percent of the company's capital stock. At the time of the will's execution, the company had a history of paying no dividends. As of December 31, 1988, the book value of the company was $5,340 per share, while its fair market value was $5,389 per share – giving Rinaldi's shares a total book value of $1,390,178 and a fair market value of $1,520,067. [Actually the market value date is November 25, 1988. Book value on that date is not available.]
>
> 'After directing payment for his burial, debts, and administration expenses, as well as devising his tangible personal property to his

wife, Rinaldi's will addressed the disposition of his ownership in the printing company. The will first provided that if Rinaldi's wife failed to survive him, and his son did survive him, the stock would be devised outright to his son. However, if his wife survived Rinaldi, then the stock would go to the "Nelle M. Rinaldi Trust" ("the Trust"), the net income of which was to be payable to his wife at least annually. At her death, the Trust was to terminate, and the stock distributed outright to his son. If his son failed to survive Rinaldi's wife, then the income of the Trust was to be accumulated after the wife's death and later distributed with the stock to Rinaldi's grandchildren.

'The son was nominated as trustee of the Trust, but his authority to manage the Trust was made subject to several conditions. As long as the son continued in the day-to-day management of the company, the voting rights of the stock were to be vested in him. But if, for any reason, the son became unwilling or unable to continue active management of the company, the voting rights were to be vested in Rinaldi's wife, or, if she was no longer living, in the fiduciary of the Trust. Additionally, as soon as practicable after the son gave up day-to-day management, the fiduciary of the Trust was to offer to sell the Trust's stock to the son at book value. [No effort was made to try to determine the loss of stock value due to a loss of a key man. This was argued extensively by Plaintiff.] If the sale to the son was not effectuated, then the fiduciary was to select other potential buyers and offer reasonable terms for the stock's sale. The will went on to provide that:

> 'I hereby authorize but do not direct my Personal Representative to elect that the property (Rinaldi Printing Company capital stock) constituting the principal of this Trust be treated as qualified terminable interest property for the purpose of qualifying for the marital deduction allowed in determining the federal estate tax upon my estate.

'The rest of Rinaldi's property was divided between two residuary trusts: the Exemption Equivalent Trust ("the EET") and the Residuary Trust. The property chosen to fund the EET was to equal in value the unified credit against the federal estate tax. See §2010(a). The net income of the EET was to be paid to Rinaldi's wife and living descendants, according to the trustee's discretion, as long as his wife had income sufficient to maintain her standard of living. At his wife's death, the principal and undistributed net income of the trust were to

be distributed in two equal parts — one to Rinaldi's son William, and the other in trust for the benefit of the issue of Rinaldi's deceased son Clyde. The value of the assets chosen to fund the EET amounted to approximately $600,000.

'The balance of Rinaldi's estate went to the Residuary Trust, out of which were to be paid the debts, taxes, and expenses of the estate. The net income of this trust was to be paid at least quarterly to his wife during her lifetime, and the trustee was authorized to invade the corpus for her benefit. Rinaldi gave his wife a general power of appointment over the corpus of the trust, exercisable during her life or through her will. The portion of the corpus over which she did not exercise her appointment power was to be distributed in the same manner as the EET corpus. The value of the assets chosen to fund the Residuary Trust amounted to approximately $370,000.

'Subsequent to the execution of Rinaldi's will, the company elected S corporation status for federal income tax purposes, effective on January 1, 1987. Under the Tax Code, stockholders of an S corporation were allowed to include trusts which acquire shares by operation of a will, 'but only for a 60-day period beginning on the day on which such stock [was] transferred to it.' §1361(c) (2) (A) (iii). Thus, if the trust established by Rinaldi maintained ownership of his shares, the company would lose its S corporation status and thereby incur a heavier tax burden.

'On November 22, 1989, eleven months after Rinaldi's death, the directors of the company approved a redemption of Rinaldi's shares from the Trust. On the same date, Rinaldi's son, as trustee, entered into an agreement with the company to redeem the shares. The company agreed to pay the trust $1,520,067 for the shares, with $100,000 paid at the closing and the balance paid in quarterly installments over a 20-year period, with 8.5 percent interest. Following the closing, the trust was to have no further ownership or participating interest in the company other than as a creditor. Rinaldi's son signed the agreement in his capacities both as trustee and as the company's president. On January 2, 1990, Rinaldi's shares were transferred to the estate to Rinaldi's son, as trustee of the Nelle M. Rinaldi trust. On January 15, 1990, the shares were retired pursuant to the redemption agreement.

'On Rinaldi's federal estate tax return, filed on November 29, 1989, his estate reported a transfer tax liability of $107,267.32. This

included the election of a Qualified Terminable Interest Property martial deduction of $1,520,067, representing the value of Rinaldi's shares that had been devised in trust. In examining the return, the IRS ruled that the devised shares did not qualify for the claimed deduction. On April 10, 1992, and October 30, 1992, Rinaldi's estate (hereinafter 'plaintiff') deposited a total of $544,715.68 toward its anticipated liability stemming from IRS adjustments to its return, including the Qualified Terminable Interest Property denial. On September 8, 1992, the IRS issued a statutory notice of deficiency to plaintiff, asserting an increase of $642,737 in plaintiff's estate tax. The first notice of deficiency was substantially rescinded and plaintiff's tax liability, reduced after adjustments to $387,520.08, plus $135,868.07 in interest, was assessed against plaintiff on November 10, 1992.

'On June 17, 1993, plaintiff filed a claim with the IRS for a refund of taxes of approximately $394,884, plus interest. The IRS disallowed the claim by letter dated August 6, 1993. On August 2, 1995, plaintiff filed its complaint with this court."

The "Introduction" to the Court's opinion points to one factor which has been significantly ignored in the subsequent history of the case: the issues before the court are "Subject to the parties cross motions for summary judgment". The plaintiff has consistently pointed out that there are issues of fact undetermined, and significant to the determination of the case. These are substantial and will be discussed in our Reasons for Granting the Writ, page 6.

REASONS FOR GRANTING THE WRIT

We have recited two questions as presented by our Petition.

The second is the least complex, but still somewhat involved because of the manner of treatment by the Department of Justice. We have included in the Appendix, one paragraph, the first, from the Department's Appellee's Brief:

"Whether the Court of Federal Claims correctly held that the taxpayer estate was not entitled to a marital deduction for the value of shares of stock bequeathed to a marital trust under the decedent's will, because the property did not constitute qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code."

This statement completely ignores the defendant's very substantial insistence that there are material issues of fact undetermined. The most important one has been repeated time after time again in the proceedings.

The testator in this case, at the time of executing his will was BLIND, BLIND, BLIND. It takes no legal genius to determine that this has something to do with the determination of his intention concerning the meaning of the words used in his will.

On the Motion for Summary Judgment, the major part of the Plaintiff's oral argument was centered on the fact of the testator's blindness. Yet there is NOT ONE WORD on this subject in Judge Weise's opinion (Appendix A-1).

Why did Clyde Rinaldi have any interest in the event of his son's leaving the company? His blindness is critical, especially in a visual industry.

What is the effect of that on market value?

How is the Court so sure that market value in current prosperity will persist in a future - perhaps long future - event?

In one sense this case, if not stopped at this juncture, could spell the end of legitimate use of efforts at conclusion of close cases by use of motion for summary judgment.

If you move for summary judgment, the Department of Justice will try to ignore (as it did here) that the case was tried on summary judgment motion, state the issues as through it were tried in full trial, facts and law, and claim - "you lost, case is over", and a court, with some confidence in the reputation of the Department, may agree.

Unless this Court intervenes, that is what we have here. The Supreme Court of the United States has been strongly convinced of the fair use of summary judgment as a practical litigation tool. It has demonstrated it's desire that summary judgment be fairly and effectively used. The 1986 trilogy of Supreme Court cases has been considered a demonstration of this interest in the fair use of summary judgment. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S Ct. 1348, 89 L Ed. 2d 538 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91

L. Ed. 2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). It should be preserved.

Second Reason. The intrusion into the case of a change in the law by the Department of the Treasury, has complicated this case, and produced an interesting constitutional series of questions.

On August 18, 1998, Treasury Decision 8779 was filed with the **Federal Register**.

This caused the Plaintiff in this case to hurriedly perform some tasks which are related to this case, including:

1. As of September 2, 1998, execute and mail to the Internal Revenue Service (Atlanta Service Center) a QTIP election under T.D. 8779 (copy attached to Appendix, A-27).

2. Move for relief, etc. under the provisions of Rule 60 (b) (1) of the Court for relief from the Final Judgment on the cause previously entered by the trial judge.

3. Ask for relief from the Decision (and Judgment) of the Court of Appeals, which relied entirely on the December 31, 1997 Opinion of the Court of Federal Claims (attached as Appendix, A-27).

Subsequently, the Department of Justice has filed its response to this motion (Appendix A-32). Plaintiff has moved to strike that Response (Appendix A-57) and the Court has denied the motion for relief based on decedent's December 18, 1998 Response (Appendix A-56).

A Problem of Unusual Significance. We now have a legal constitutional problem of significance. A department and agency of the United States Government, has made a change in its operational activities and in its relationship with a taxpayer, already before the Courts.

This is, however, a new agency activity, actually to be reexamined in the course of performance under law now changed by the Congress (see, for example, Section 1331, IRS Restructuring and Reform Act of 1998).

Even as a Title I Court (Howard v. U.S., 31 Fed Cl 297, 307 (1998)) it must not interfere with executive processes until they have come to an

administrative conclusion, and the judicial process must wait until the administration process concludes.

That is the proper procedure.

And only the Supreme Court of the United States can now properly obtain that result.

CONCLUSION

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted, and the Judgment of the Court of Appeals for the Federal Circuit and the Judgment of the United States Court of Federal Claims appropriately corrected, and the case returned for proper disposition.

GEORGE W. ERICKSEN, ESQUIRE
POST OFFICE BOX 172238
TAMPA, FLORIDA 33672
(813)223-7803
(813)221-8106 - FAX
FLORIDA BAR NO.: 022873

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In the United States Court of Federal Claims

No. 95-493 T

Filed: July 11, 1997

ESTATE OF CLYDE L. RINALDI,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Tax; Estates, trusts, and beneficiaries. - Where trust established by testator's will for benefit of surviving spouse consisted of stock subject to potential bargain sale to third party, trust's property was not entitled QTIP treatment under I.R.C. § 2056 despite fact that the stock was redeemed for money after testator's death. Held further, calculation of allowable casualty loss inflicted by freeze of citrus groves should be made with reference to the entire grove, not individual trees.

George W. Ericksen, Tampa, Florida, for plaintiff.

Elizabeth D. DePriest, with whom were Loretta C. Argrett, Assistant Attorney General, Mildred L. Seidman, Chief, Court of Federal Claims Section, and Steven I. Frahm, Senior Trial Attorney, Department of Justice, Washington, D.C., for defendant.

OPINION

WIESE, Judge.

Introduction

Plaintiff, the estate of Clyde L. Rinaldi, seeks a refund of taxes assessed against it by the Internal Revenue Service stemming from the agency's disallowance of certain deductions claimed by plaintiff as part of its estate tax return. The two issues subject to the parties' cross-motions for summary judgment presently before the court are: the validity of the estate's election of a marital trust as qualified terminable interest property ("QTIP") under Internal Revenue Code § 2056(b)(7); and the amount properly deductible as a casualty, under § 2054, for the freeze loss of citrus groves owned by plaintiff.[1] The court will address each issue in turn.

The QTIP Marital Deduction

The Factual Background

The decedent, Clyde L. Rinaldi, died testate on November 25, 1988, survived by his wife, Nelle M. Rinaldi, his son, William S. Rinaldi, Sr., and several grandchildren. His will was admitted to probate on December 21, 1988. Rinaldi's wife and son were nominated under the will and qualified by the local probate court to serve as co-personal representatives of the estate.

Rinaldi served for many years as the chief executive officer of the Rinaldi Printing Company. The printing company was founded in 1905 by Rinaldi's father, and was incorporated in 1963 under the laws of Florida. On March 14, 1983, when the will was executed, Rinaldi's son served as the company's chief executive officer, while Rinaldi served as the director. At that time – and on the date of his death as well – Rinaldi owned 52.06 percent of the company's capital stock. At the time of the will's execution, the company had a history of paying no dividends. As of December 31, 1988, the book value of the company was $5,340 per share, while its fair market value was $5,389 per share - giving Rinaldi's shares a total book value of $1,390,178 and a fair market value of $1,520,061.

After directing payment for his burial, debts, and administration expenses, as well as devising his tangible personal property to his wife, Rinaldi's will addressed the disposition of his ownership in the printing company. The will first provided that if Rinaldi's wife failed to survive him, and his son did survive him, the stock would be devised outright to his son. However, if his wife survived Rinaldi, then the stock would go to the "Nelle M. Rinaldi Trust" ("the Trust"), the net income of which was to be payable to his wife at least annually. At her death, the Trust was to terminate, and the stock distributed outright to his son. If his son failed to survive Rinaldi's wife, then the income of the Trust was to be accumulated after the wife's death and later distributed with the stock to Rinaldi's grandchildren.

The son was nominated as trustee of the Trust, but his authority to man-

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[1]Plaintiff also seeks a refund based on the deductibility of amounts representing increased administrative expenses incurred after the estate tax return at issue was filed, as well as the interest paid on a loan, the proceeds of which were used to pay federal estate and state inheritance taxes. Briefing has been postponed as to these aspects of plaintiff's claim, as the parties expect that they can be resolved without the court's intervention.

age the Trust was made subject to several conditions. As long as the son continued in the day-to-day management of the company, the voting rights of the stock were to be vested in him. But if, for any reason, the son became unwilling or unable to continue active management of the company, the voting rights were to be vested in Rinaldi's wife, or, if she was no longer living, in the fiduciary of the Trust. Additionally, as soon as practicable after the son gave up day-to-day management, the fiduciary of the Trust was to offer to sell the Trust's stock to the son at book value. If the sale to the son was not effectuated, then the fiduciary was to select other potential buyers and offer reasonable terms for the stock's sale. The will went on to provide that:

> I hereby authorize but do not direct my Personal Representative to elect that the property (Rinaldi Printing Company capital stock) constituting the principal of this Trust be treated as qualified terminable interest property for the purpose of qualifying for the marital deduction allowed in determining the federal estate tax upon my estate.

The rest of Rinaldi's property was divided between two residuary trusts: the Exemption Equivalent Trust ("the EET") and the Residuary Trust. The property chosen to fund the EET was to equal in value the unified credit against the federal estate tax. See § 2010(a). The net income of the EET was to be paid to Rinaldi's wife and living descendants, according to the trustee's discretion, as long as his wife had income sufficient to maintain her standard of living. At his wife's death, the principal and undistributed net income of the trust were to be distributed in two equal parts - one to Rinaldi's son William, and the other in trust for the benefit of the issue of Rinaldi's deceased son Clyde. The value of the assets chosen to fund the EET amounted to approximately $600,000.

The balance of Rinaldi's estate went to the Residuary Trust, out of which were to be paid the debts, taxes, and expenses of the estate. The net income of this trust was to be paid at least quarterly to his wife during her lifetime, and the trustee was authorized to invade the corpus for her benefit. Rinaldi gave his wife a general power of appointment over the corpus of the trust, exercisable during her life or through her will. The portion of the corpus over which she did not exercise her appointment power was to be distributed in the same manner as the EET corpus. The value of the assets chosen to fund the Residuary Trust amounted to approximately $370,000.

Subsequent to the execution of Rinaldi's will, the company elected S corporation status for federal income tax purposes, effective on January 1, 1987. Under the Tax Code, stockholders of an S corporation were allowed to include trusts which acquire shares by operation of a will, "but only for the 60-day period beginning on the day on which such stock [was] transferred to it." § 1361(c)(2)(A)(iii).[2] Thus, if the trust established by Rinaldi maintained ownership of his shares, the company would lose its S corporation status and thereby incur a heavier tax burden.

On November 22, 1989, eleven months after Rinaldi's death, the directors of the company approved a redemption of Rinaldi's shares from the Trust. On the same date, Rinaldi's son, as trustee, entered into an agreement with the company to redeem the shares. The company agreed to pay the trust $1,520,067 for the shares, with $100,000 paid at the closing and the balance paid in quarterly installments over a 20-year period, with 8.5 percent interest. Following the closing, the trust was to have no further ownership or participating interest in the company other than as a creditor. Rinaldi's son signed the agreement in his capacities both as trustee and as the company's president. On January 2, 1990, Rinaldi's shares were transferred from the estate to Rinaldi's son, as trustee of the Nelle M. Rinaldi trust. On January 15, 1990, the shares were retired pursuant to the redemption agreement.

On Rinaldi's federal estate tax return, filed on November 29, 1989, his estate reported a transfer tax liability of $107,267.32. This included the election of a Qualified Terminable Interest Property marital deduction of $1,520,067, representing the value of Rinaldi's shares that had been devised in trust. In examining the return, the IRS ruled that the devised shares did not qualify for the claimed deduction. On April 10, 1992, and October 30, 1992, Rinaldi's estate (hereinafter "plaintiff") deposited a total of $544,715.68 toward its anticipated liability stemming from IRS adjustments to its return, including the Qualified Terminal Interest Property denial. On September 8, 1992, the IRS issued a statutory notice of deficiency to plaintiff, asserting an increase of $642,737 in plaintiffs estate tax. The first notice of deficiency was subsequently rescinded and plaintiffs tax liability, reduced after adjustments to $387,520.08, plus $135,868.07 in interest, was assessed against plaintiff on November 10, 1992.

On June 17, 1993, plaintiff filed a claim with the IRS for a refund of

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[2] On August 20, 1996, § 1361(c)(2)(A)(iii) was amended to substitute a 2-year period for the previously allowed 60-day period. See Pub. L. No. 104-88, § 1303(1), 110 Stat. 1779

taxes of approximately $394,884, plus interest. The IRS disallowed the claim by letter dated August 6, 1993. On August 2, 1995, plaintiff filed its complaint with this court.

The Statutory Framework

The Internal Revenue Code ("I.R.C.") imposes a tax "on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." § 2001(a). The taxable estate equals the value of the taxpayer's gross estate - consisting of all of the taxpayer's property at time of his death, see § 2031(a)- minus any applicable deductions. See § 2051. Among the deductions available to a taxpayer is one which allows the taxpayer to reduce the taxable value of his gross estate by "an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse," provided that the interest is included in initially determining the value of the gross estate. § 2056(a). This "marital deduction" allows the postponement of tax on the property until the surviving spouse disposes of the property, whether transfer inter vivos or at death.

To ensure that none of the property escapes taxation, the Code contains an exception to this marital deduction, which disallows deductions for property devised to the surviving spouse through the grant of a "terminable interest" in the property. Generally, these are interests which will fail with the lapse of time, or upon the occurrence of an event or condition. See § 2056(b)(1). A prime example of such an interest is the life estate. Because a life estate terminates upon death, the subject property would not be included in the gross estate of a surviving spouse. That property could thereby escape taxation altogether if a deduction of its value by the owner-spouse were allowed.

Several "counter-exceptions" to the general prohibition of terminable interest deductions exist, however. Among these is the Qualified Terminable Interest Property ("QTIP") deduction created by Congress in 1981. The Code defines QTIP as property (i) which passes from the decedent, (ii) in which the surviving spouse has a qualifying income interest for life, and (iii) to which an election is made on the estate's tax return. See § 2056(b)(7)(B)(i). The Code, in turn, defines a "qualifying income interest for life" as one by which the surviving spouse is entitled to all the income from the property, payable at least annually. Further, no person may have power to appoint any part of the property to any person other than the surviving spouse, unless the power is exercisable only at or after the surviving

spouse's death. See § 2056(b)(7)(B)(ii). Once made, an election to claim a marital deduction for QTIP is irrevocable. See § 2056(b)(7)(B)(v).

Discussion

Defendant asserts that the IRS was correct in disallowing plaintiff's claimed QTIP deduction because the testamentary scheme established by Rinaldi failed to meet the statutory requirements for QTIP eligibility. Specifically, defendant argues that the Trust established by Rinaldi's will did not give rise to the "qualifying income interest for life" to which the surviving spouse must be entitled in order to qualify under § 2056(b)(7). In the event that Rinaldi's son ceased day-to-day management of the company, the will obligated him, as trustee, to offer to sell the stock to himself at book value - a price substantially below the fair market value of the stock at the time. Such a transaction would effectively diminish the value of the trust's corpus, a potentiality which runs counter to the QTIP requirement that "no person has a power to appoint any part of the property to any person other than the surviving spouse." § 2056(b)(7)(B)(ii)(II).

According to defendant, the bargain sale would reduce the Trust's principal and remove property from the wife's estate. This, in turn, would permit property which had already avoided taxation in Rinaldi's estate through the QTIP election to escape taxation in his wife's estate as well. As defendant correctly points out, the intent of the QTIP provision "is to permit property to escape taxation from the estate of the first spouse to die, so long as the property unused during the lifetime of the surviving spouse is included and taxable in her estate."

Plaintiff does not contest defendant's portrayal of the QTIP provisions, but rather argues that changed circumstances have brought the Trust established by Rinaldi's will into full compliance with the statutory requirements. Because the company would lose its tax-reducing S corporation status if the Trust maintained its ownership of Rinaldi's shares, the parties entered into a stock redemption agreement on November 22, 1989 - one week before the QTIP election was made through the filing of plaintiff s estate tax return. As such, at the time of the election, plaintiff argues that the Trust owned none of the shares, and Rinaldi's son thus had no right to purchase them at a bargain price. With no possibility of a bargain sale, according to plaintiff, the corpus of the trust was not subject to diminution, and no obstacle to QTIP eligibility remained.

The initial question for the court, then, is to determine the point' at which property must be statutorily eligible for QTIP treatment. If eligibility must be attained at the time of the testator's death, then the court in this case need only look to the terms of the will, and to the right granted thereunder giving the son the opportunity to purchase the Trust's shares at a price below fair market value. Under this approach, the inquiry would end at that point, as the property would clearly fall short of the QTIP non-diminution requirements. If, however, property's QTIP eligibility should not be judged until the estate's executor elects such treatment, then the court's inquiry will expand to include those events occurring subsequent to the testator's death that, according to plaintiff, cured the property's ineligibility.

A long line of cases echoes the principle that, in general, "qualification for the marital deduction must be determined as of the time of death." Jackson v. United States, 376 U.S. 503, 508 (1964). See also Estate of Wycoff v. Commissioner, 506 F.2d 1144, 1149 (10th Cir. 1974) ("[I]n determining whether an interest of the surviving spouse is entitled to the marital deduction, the time of death of the decedent governs the tax consequences."); Murray v. United States, 687 F.2d 386, 393 n.8 (Ct. C1. 1982) ("[T]he tax consequences are to be determined as of the time of death of the decedent."). If the trust does not satisfy the statutory requirements at the time of the relevant transaction – usually the death of the decedent – "deductibility of the bequest in controversy cannot hang suspended pending later events." Estate of Weisberger v. Commissioner, 29 T.C. 217, 221-22 (1957).

Defendant's reliance on this line of cases, though well-founded, does not adequately address the circumstances presented by the QTIP election in this case. Because courts in cases like Jackson "ruled on the proper determination date for an interest which is not an exception to the [terminable] interest rule, and not subject to a later election, we do not think [they are] dispositive of this issue." Estate of Spencer v. Commissioner, 43 F.3d 226, 231 (6th Cir. 1995). In most situations in which a marital deduction is sought, the final event of any relevance will be the testator's death. In contrast, when QTIP treatment is sought by a taxpayer's estate, one of the prerequisites is that an election have been made on the estate tax return - an event which naturally cannot take place until after the testator's death. Several courts have recognized this event as being of significance sufficient to justify postponing the QTIP eligibility determination until its occurrence.

In Spencer, the taxpayer's will did not designate specific property to receive QTIP treatment, but rather granted his executor the authority to

decide what amount of property would be subject to QTIP treatment when the time came to make the election. The IRS argued that because the executor had the power to decide how much property would go to the QTIP trust, she "possessed an impermissible power to appoint property away from the surviving spouse for the interim period from decedent's death until the date of the QTIP election." Id. at 227.

The court rejected this argument, noting first that "[i]t is often impossible to prudently designate what should be committed as QTIP far in advance of death." Id. at 228. Further, because "no property meets the definition of QTIP until the proper election is made, and no QTIP election can be made until the estate tax form is filed," id. at 231, then logically "no property anywhere can meet the definition of [QTIP] until after the decedent's death." Id. at 228. As such, the court reasoned, it would be "contrary to the policy and meaning of the statute, as well as counter-intuitive and against common sense, to apply the definition before the election can be satisfied." Id. Therefore, the court held that "the date of election is the proper date for deciding if property meets the requirements set out under § 2056(b)(7)." Id.[3]

As to the nature of the QTIP election itself, the court expressed its view as follows:

> The IRS would have us adopt an interpretation that would force property to satisfy every requirement for the QTIP counter-exception on the date of decedent's death except the requirement of election. This would effectively reduce the election requirement to a mere formality, defeat its apparent purpose and its most reasonable interpretation.

Other courts have also refused to invalidate a QTIP election when the subject property is not explicitly defined at the time of the testator's death. In Estate of Clayton v. Commissioner, 976 F.2d 1486, 1490 (5th Cir. 1992), the testator's will provided that any property for which a QTIP election was not made would go into a non-QTIP trust. The IRS took the position that this power of the executor to divert part of the estate's property away from a QTIP trust was "'tantamount' to a power of appointment to the testator's

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[3]Following Spencer, the IRS issued temporary regulation § 20.2056(b)-7T(d)(3)(ii), which provides that, for decedents whose estate tax returns are due to be filed after February 18, 1997, an otherwise qualifying income interest that is contingent on an executor's election will not be precluded from QTIP status under the requirements of § 2056(b)(7).

children." Id. at 1497. The court disagreed, finding the IRS's argument to be "flawed logic and deliberate disregard of the plain wording of [the statute]," id., and noting "the overarching truism that many acts must be done and many facts must be determined after the death of the testator in order to determine the taxable estate." Id. at 1498. See also Estate of Robertson v. Commissioner, 15 F.3d 779, 781 (8th Cir. 1994) ("We believe the [executor's] right to make or refrain from making a QTIP election is not a prohibited 'power to appoint.'").

The logic of this line of cases is readily apparent in light of the policies underlying the QTIP legislation. Congress enacted § 2056(b)(7) primarily to allow a testator to provide for a surviving spouse while maintaining control over the ultimate disposition of his or her property following the surviving spouse's death. See H.R. Rep. No. 97-201, at 159-60 (1981). Under prior law, a testator was forced to choose between leaving property outright to his or her surviving spouse, in which case the property would not be included in the taxable estate, and leaving the property to his or her surviving children, in which case it would be taxed at the testator's death. Under the enacted QTIP provision, a testator may give the surviving spouse the benefit of the property for his or her lifetime without also granting the discretion to direct the ultimate disposition of the property away from the testator's intended beneficiaries.

In offering this tax-deferral opportunity, Congress was careful to include several important conditions within the statutory framework. Most important to our inquiry was its requirement that no person have the "power to appoint any part of the property to any person other than the surviving spouse." § 2056(b)(7)(B)(ii)(II). This provision does not reflect a congressional purpose of ensuring the financial stability of the surviving spouse, for "[i]f the intention had been to dangle the carrot of deductibility in front of testators to induce them to ensure the financial well-being of the surviving spouse, Congress would surely have given the power to make the QTIP election to the surviving spouse, not the executor." Clayton, supra, at 1498. Rather, the restriction's inclusion is to ensure that QTIP property does not escape taxation in the surviving spouse's estate, apart from that portion of the corpus used in furtherance of the surviving spouse's well-being. Congress was not concerned with that portion of the estate's property that, for whatever reason, is ineligible for QTIP treatment because "that property is taxed right where the Commissioner and Congress want it taxed – in the estate of the first spouse to die." Id.

There is no compelling reason to prohibit QTIP treatment for those assets whose election is left up to the discretion of the executor. If the executor includes a particular asset in the QTIP trust established by the testator's will, then the asset will be taxed in the estate of the surviving spouse. If the executor declines to elect QTIP status for an asset, then it will be taxed in the testator's estate. Congressional objectives thus do not require that the status of a particular asset be determined at the time of the testator's death. As long as property's QTIP eligibility is ascertainable when the executor elects such treatment in the estate tax return, postponing the eligibility determination until that time runs afoul of neither the plain meaning of the statute's language, nor its underlying objectives.

Thus, the court rejects, as a general proposition, defendant's blanket assertion that property's QTIP eligibility must be judged at the time of the testator's death. In cases like Spencer, Robertson, and Clayton, courts have sensibly allowed property's eligibility to be determined at the time of its QTIP election. However, accepting the holdings of those courts does not invariably lead to a finding for plaintiff in this case. The factual circumstances on which the reasoning of Spencer and its progeny were based differ dramatically from the circumstances presented by the case at hand. In Spencer, for example, the terms of the testator's will clearly established a valid QTIP trust - the only ambiguity stemmed from the discretion granted to the executor to decide what amount of property to contribute to the trust. See 43 F.3d at 227.

In this case, by contrast, the trust established by the terms of Rinaldi's will was clearly ineligible for QTIP treatment - the will explicitly subjected the trust's value to diminution through the potential sale of its assets at a bargain price to someone other than the surviving spouse. It is only because the terms of the will apparently no longer dictate the make-up of the trust that plaintiff now can assert QTIP eligibility. Because the printing company would have lost its S corporation status - thereby gaining a heavier tax burden - if the trust became a permanent stockholder of the company, the interested parties arranged for the redemption of the shares at a price reflecting their fair market value. As a result, the corpus of the QTIP trust consisted of money, not stock. Because the trust owned no shares, it logically could not sell them to anyone, much less at a bargain price. According to plaintiff, this negated any possibility that a portion of the trust would be appointed to someone other than Rinaldi's wife during her lifetime, thereby remedying the only deficiency of the trust.

The difficulty with accepting plaintiff's characterization stems from the means by which the trust's defect was allegedly remedied. The trust may indeed have rid itself of the troublesome stock in question; what remains unchanged, however, are the terms of the will that rendered the trust ineligible for QTIP treatment in the first place. There exists no legal impediment to the trust's ownership of the printing company's stock. Rather, it is only the company's desire to continue as an S corporation that led to the shares' redemption. And it is only the maintenance of that desire which keeps the trust's defect from again rising to the surface. For example, if a change in tax law were to diminish the disparity between "S" corporations' and "C" corporations' relative tax burdens, thereby making the company's continued operation as an S corporation significantly less desirable, there is nothing to prevent the trust from reacquiring shares of the company. In the event of such a reacquisition, the terms of Rinaldi's will presumably would still govern. Under those terms, the shares potentially would be subject once again to a bargain sale to Rinaldi's son or a third party, thereby diminishing the corpus of the trust. The portion of the trust's corpus lost in the bargain sale would have escaped taxation in both Rinaldi's and his surviving spouse's estates - the very potentiality which the statutory QTIP requirements were implemented to avoid.

Granted, the likelihood that Rinaldi's trust will reacquire the company's stock, and that his son will quit the company's management - thereby spurring the bargain sale - may be remote. But when it comes to judging QTIP eligibility, "it is the possibility, not the probability, that an interest will terminate or fail that will determine whether the surviving spouse's interest is a 'qualifying income interest for life,'" Estate of Kyle v. Commissioner, 94 T.C. 829, 845 (1990). Because deductions, whether from income or estate taxes, are "a matter of legislative grace," the taxpayer must meet every condition of eligibility set forth by Congress:

> It is not enough that such conditions are nearly met, or that a potentiality inconsistent with the legislative mandate is unlikely to actually become operative. The taxpayer may not haggle with Congress; he either fits squarely within the statute in every particular or the deduction is unavailable.

Estate of Weisberger v. Commissioner, 29 T.C. 217, 220 (1957). This mindset has led courts to take consistently firm stances against QTIP treatment for trusts failing to meet one of § 2056's requirements. See Estate of Doherty v. Commissioner, 95 T.C. 446, 460-61 (1990) (rejecting QTIP treat-

ment for trust where surviving spouse had discretion as trustee to accumulate all or part of trust income for distribution to others upon his death), rev'd on other grounds, 982 F.2d 450 (10th Cir. 1992); Estate of Bowline v. Commissioner, 93 T.C. 286, 296 (1989) (rejecting QTIP treatment for trust where trustee was authorized to invade trust corpus during life of surviving spouse to provide for emergency needs not only of surviving spouse, but also of decedent's surviving son and brother).

This potential reemergence of the trust's defect reflects an even more fundamental problem with the approach to QTIP eligibility advocated by plaintiff. Plaintiff is asking this court to judge property's QTIP eligibility solely on the basis of the factual circumstances in place at the time of the executor's election, regardless of the specific terms of the testator's will. Under plaintiff's approach, ad hoc measures enacted after the testator's death by the executor would effectively negate the memorialized intent of the testator, no matter how contrary that intent was to the letter and spirit of the QTIP requirements. In Spencer, Clayton, and Robertson, the testators' memorialized intent was to allow their executors to decide whether or not to elect QTIP status as to a particular asset - importantly, however, every aspect of their wills' terms was consistent with QTIP eligibility. Here, in contrast, Rinaldi's explicit intent was to allow his wife's trust to operate in a manner clearly inconsistent with § 2056(b)(7)'s criteria. To say the least, it would take a generous reading of tax law by the court to extract a legally viable QTIP trust from the facially invalid framework set forth by the testator. Such a reading, in this court's view, is not feasible.

Courts have long noted that the "achievement of the purposes of the marital deduction is dependent to a great degree upon the careful drafting of wills." Jackson v. United States, 376 U.S. 503, 511 (1964); see also Estate of Wycoff v. Commissioner, 506 F.2d 1144, 1149 (10th Cir. 1974) ("[T]he marital deduction is to be strictly construed."). The QTIP criteria at issue in this case come from "the precise language of a precise statute." Estate of Howard v. Commissioner, 910 F.2d 633, 635 (9th Cir. 1990). In creating the underlying framework allowing marital deductions subject to the terminable interest rule, Congress "chose a technique which required the draftsmen of testamentary instruments to be meticulous in adhering to the formal requirements of section 2056." Alien v. United States, 359 F.2d 151, 153 (2d Cir. 1966).

In addition to requiring precision in the crafting of a will's terms, courts interpreting QTIP provisions place an unmistakable emphasis on the

expressed intent of the testator. In Estate of Cavenaugh v. Commissioner, 51 F.3d 597 (5th Cir. 1995), the testator's estate, in an effort to reduce the subsequent tax burden faced by the surviving spouse's estate, argued that its own QTIP election, previously allowed by the IRS, had been improper. The estate argued that some of the QTIP trust's income might have gone to the testator's descendants, rather than being distributed currently to the surviving spouse, as required by § 2056(b)(7)(B)(ii)(I). This possibility existed, according to the estate, because no provision of the testator's will, nor of state law, prohibited the accumulation of the trust income. See id. at 600. The court found no significance to the lack of an express prohibition, reasoning that, in determining property's QTIP eligibility, "[w]hether the surviving spouse is entitled to all the income is not measured by an abstract principle of law but merely by reference to the decedent's intent." Id. at 601. "In other words," the court went on to explain, "whether [the testator] intended that [the surviving spouse] receive all of the income from these property interests and whether she did - or did not - authorize any other person to appoint part of this property to somebody other than her spouse is dispositive." Id.

When measured against these twin strains of judicial analysis – emphasizing the will's language and the testator's intent - Rinaldi's will falls short. The terms of the will are precise, but their precision sets forth a framework directly contradictory to the statutory requirements for QTIP eligibility. And Rinaldi clearly intended to establish the trust with a condition that would render it ineligible for QTIP treatment. Regardless of his motivation, he did not want his wife's trust to be made up of the printing company's stock in the event that his son no longer participated in the company's management. To bring this about, he was willing to arrange a bargain sale of the shares to his son - an arrangement that violates both the letter and spirit of §2056(b)(7).

Plaintiff would have us ignore both the terms of the will and the intent of the testator, and focus solely on the factual circumstances as they happened to exist at the time of the QTIP election. The court, however, does not believe that the inquiry into a trust's QTIP eligibility can be divorced from the testamentary framework from which it arose. It is one thing to allow the testator - as the court did in Spencer, for example – to defer the identification of particular QTIP assets until after his or her death, when an account of the estate can be made. In those situations, recognizing the validity of the resulting QTIP trust is consistent with the terms and underlying tax policies of § 2056, as well as the intentions and instructions of the testator. It is quite

another matter to allow the executor to step in and point to a post-mortem, circumstantial change in the QTIP trust as a remedy for an obvious flaw created by the terms of the trust itself, as set forth in the will.

The trust in this case is inherently ineligible for QTIP treatment due to the provision of Rinaldi's will allowing the bargain sale of the trust's stock to a third party; the fact that the trust presently does not own the shares subject to the defective provision in question does not negate that provision's effect. Postponing the eligibility determination until the time of the executor's QTIP election - regardless of whether such postponement is legally valid - would still leave the court facing a trust with operating terms clearly contrary to the explicit criteria of § 2056(b)(7). The court holds that the company's post-mortem redemption of the shares devised to the trust by Rinaldi's will did not bring the trust into compliance with the statutory requirements for QTIP eligibility.[4] Thus, the IRS was correct in ruling that the trust property did not qualify for a QTIP marital deduction

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[4] Alternatively, plaintiff argues that Rinaldi's will contained an ambiguity - that Rinaldi clearly intended the Trust's assets to be available for a QTIP election, but that this conflicted with the existence of the son's potential right to a bargain sale of the stock. Under Florida law, this ambiguity should be resolved, according to plaintiff, by deferring to whichever provision occurs later in the will: "If there is an irreconcilable conflict between two provisions in a will, the latter provision will usually prevail as being the last expression of the intentions of the testatrix where the provisions refer to the same subject matter." Dutcher v. Estate of Dutcher, 437 So.2d 788, 790 (Fla. Dist. Ct. App. 1983). In this case, the authorization of a QTIP election is the later provision.

The court finds no merit in plaintiff's argument. According to plaintiff, paragraph D of Article Four of Rinaldi's will "makes a very clear statement of a purpose to require the trust property to continue to constitute 'qualified terminable interest property.'" That paragraph, in its entirety, reads as follows:

> I hereby authorize *but do not direct* my Personal Representative to elect that the property (Rinaldi Printing Company capital stock) constituting the principal of this Trust be treated as qualified terminable interest property for the purpose of qualifying for the marital deduction allowed in determining the federal estate tax upon my estate.

(emphasis added).

Clearly, the testator has left the QTIP election up to the discretion of the executor. There is no indication that the executor is required to make such an election, or that any provisions of the will that might preclude QTIP status should be struck. This grant of discretion, taken together with the earlier provision directing the bargain sale of the trust's stock, does not give rise to an ambiguity, much less lead to the "irreconcilable conflict" required by the language of Dutcher, 437 So. 2d at 790.

The Orange Grove Freeze

The Factual Background

At the time of his death in November 1988, Rinaldi owned two citrus groves in Polk County, Florida. In December 1988, the fair market value of these groves was appraised by John C. Husted, the production manager of the Waverly Growers Cooperative, the company charged with the groves' management. At the time of the appraisal, Grove No. 327, a 20-acre plot of land, was planted with 547 Valencia orange trees and 331 Midseason orange trees. Grove No. 328, a 44-acre plot of land, was planted with 1,299 Marsh grapefruit trees, 64 Duncan grapefruit trees, 1,163 Hamlin orange trees, and 652 Valencia orange trees.

In calculating the value of the groves, Husted used an "income production" method, measuring the present value of the income-producing capability of the trees by projecting future net revenues discounted to present value. He included several variables in his calculations, including a tree's age and expected returns from its fruit. The appraisal categorized the trees according to age and variety, and assigned a market value to each group based on the number and average value of the trees in that group. For example, in Grove 327, Husted found 281 "mature" Midseason orange trees to have a per-tree value of $188.79, resulting in a total group value of $53,049.99. Husted repeated this calculation for all five tree groups in Grove 327, and for all ten tree groups in Grove 328. The sum of figures for all the groups would lead to a total representing the market value of both groves as of the date of Rinaldi's death.

In December 1989, during the administration of Rinaldi's estate, the area in which the groves were located suffered a major freeze. Temperatures in the groves fell below 28 degrees Fahrenheit for several hours over a period of three days, destroying or severely damaging many of the citrus trees. From February through April of 1990, Waverly employees, supervised by Husted, assessed the extent of the freeze damage to the two groves. Based on their observations, Husted calculated the post-freeze value of the remaining trees, using the same methods and variables as he used in his pre-freeze evaluation. The results reflected substantial losses. For example, in Grove 327, where Husted had previously found 281 "mature" Midseason orange trees to have a per-tree value of $188.79, there were now only 199 such trees, having a per-tree value of only $76.24. The total post-freeze value of the "mature" Midseason orange trees was $15,171.76 - an amount nearly

$38,000 below their estimated value before the freeze.

The post-freeze application of the "income production" method of appraisal resulted in the assignment of below-zero values to several tree groups. In Grove 328, for example, Husted assigned a post-freeze value of -$44.96 to 223 "reset" Marsh grapefruit trees, resulting in a total group value of -$10,026.08 - an amount nearly $11,000 below the trees' estimated pre-freeze value of $824.80. The negative values signify trees for which the costs of care and upkeep would be higher than the anticipated revenues they would generate over their lives - i.e., the damage to such a tree would prevent it from ever breaking even in a financial sense.

In its claim for partial refund of estate taxes, plaintiff sought a casualty loss of $331,331.78, representing the difference between the appraised date-of-death and post-freeze values of its citrus trees. The IRS, during its examination of the estate, disallowed any loss in excess of the date-of-death values of the trees. In other words, in its calculation of plaintiff's total loss, the IRS did not include the negative post-freeze values assigned by plaintiff to particular tree groups; rather, the IRS treated those groups as if their appraised post-freeze values were zero. This adjustment by the IRS reduced plaintiffs claimed loss by $39,895.07.

The IRS also deducted $11,997 from the recovery sought by plaintiff, which was the amount applied to plaintiff's account with Waverly Growers from the federal tree assistance program. The remaining claimed loss of $279,440 was allowed (plus an additional $42 due to a typographical error and rounding). Plaintiff here seeks to recover an amount representing the disallowed casualty losses.

The Legal Framework

For purposes of determining an estate's tax liability, I.R.C. § 2054 grants a deduction from the value of the gross estate for "losses incurred during the settlement of estates arising from fires, storms, shipwrecks, or other casualties, or from theft, when such losses are not compensated for by insurance or otherwise." A taxpayer seeking a deduction for such losses bears the burden of proving both the "existence and extent of the casualty loss, as well as the amount of such loss to be taken into account." Westvaco Corp. v. United States, 639 F.2d 700, 707 (Ct. C1. 1980).

The general rule for calculating the proper amount of a casualty loss

deduction is set forth in Treas. Reg. § 1.165-7(b)(1)[5]:

> General Rule. In the case of any casualty loss whether or not incurred in a trade or business or in any transaction entered into for profit, the amount of loss to be taken into account for purposes of section 165(a) shall be the lesser of either –
>
> (i) The amount which is equal to the fair market value of the property immediately before the casualty reduced by the fair market value of the property immediately after the casualty; or
>
> (ii) The amount of the adjusted basis prescribed in § 1.1011-1 for determining the loss from the sale or other disposition of the property involved.

In general, the basis of property ""shall be the cost of such property," §1012, with upward adjustments made for amounts spent on improving the property, such as seeding or planting, and downward adjustments made for any depreciation deductions taken. See § 1016. The basis of property "in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent," however, is "the fair market value of the property at the date of the decedent's death." § 1014.

In calculating the amount of a casualty loss, Treas. Reg. § 1.165-7(b)(2) requires that the determination be made "by reference to the single, identifiable property damaged or destroyed." The issue before the court centers on the determination of what measure of plaintiff's property is the appropriate single, identifiable property by which to measure plaintiff's casualty loss.

Discussion

Defendant argues that, "to determine the allowable loss occasioned by the December 1989 freeze, the appropriate unit of property, separately identified, must be the individual tree." Plaintiff calculated its date-of-death and post-freeze grove values by grouping trees according to variety and age, and then establishing a per-tree value. "Therefore," according to defendant, "it is both reasonable and logical to use the same property unit for measuring

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[5] Treas. Reg. § 1.165-7(b)(1) corresponds to I.R.C. § 165, which is the provision governing casualty loss deductions from a taxpayer's income tax liability. The stated rule, however, applies equally in the estate tax context.

the estate's casualty loss." Further, defendant points out that Waverly Growers' records are also maintained tree by tree, grouped by age and variety, and that its application to the federal tree assistance program "was based on the rehabilitation work performed on each tree, grouped by age." As such, the individual trees "are the appropriate units for measuring the loss plaintiffs citrus investment suffered from the freeze."

If defendant's suggested tree-by-tree approach is adopted by the court, then defendant will be entitled to judgment on this issue. For if plaintiff's casualty losses are properly calculated only along the lines of the categories under which plaintiff's appraisals were conducted, then the IRS was correct to deny recovery for any negative values assigned to particular groups. This follows from the common-sense notion that the casualty-loss deduction cannot be used by an estate to recover an amount for damage that is greater than the date-of-death value of the property in the first place. See Treas. Reg. § 1.165-7. Defendant points out that the IRS fully allowed plaintiff's claimed losses to the extent of each tree's date-of-death value. Allowing a greater recovery would, according to defendant, contradict the established tax principle "that a deductible loss cannot exceed basis."

Not surprisingly, plaintiff disagrees with defendant's characterization of the proper economic unit by which to measure plaintiff's losses. Essentially, plaintiff argues, defendant has broken down the appraisals "into non-economic units for [the] purpose of denying freeze damage losses to certain segments of a grove which is functioning as a single economic unit." Plaintiff claims that such a breakdown is "not only mathematically inaccurate," but also "legally improper." According to plaintiff, the casualty losses calculated for the grove as a whole must be accounted for in awarding the proper deduction. Under this approach, plaintiff would be entitled to judgment on this issue. In effect, the positive post-freeze values assigned to certain tree groups would offset the negative post-freeze values assigned to other tree groups, resulting in a positive value for the grove as a whole. As such, plaintiff would realize a tax benefit from the negative values because the claimed casualty-loss deduction for the grove as a whole would still not exceed the grove's date-of-death value.

As plaintiff correctly emphasizes, what the I.R.C., in allowing a taxpayer to deduct casualty losses from its taxable estate, "envisions is a loss of capital, a true economic loss to the taxpayer for which he is allowed a deduction not exceeding his adjusted cost basis." Westvaco Corp. v. United States, 639 F.2d 700, 705 (Ct. C1. 1980). There can be no tax benefit gained

"from mere paper losses or anticipated future profits, or losses of property for which [plaintiff] has no basis." Id. at 707. Rather, "plaintiff's calculation of the loss can only represent the change in fair market value attributable to the damage or destruction." Id.

These truisms, while helpful, do not lend an answer to the question at hand. If plaintiff's appraisal is broken down by variety and age of trees, then the deduction of the negative group values would amount to a recovery of mere paper, or non-economic, losses. However, if the various groups are viewed as an aggregate whole, then the previously negative values regain economic meaning due to the groves' ultimately positive post-freeze worth. Hence, the issue's disposition still lies in determining the appropriate economic unit by which the casualty losses should be measured.

The citrus grove cases cited by defendant are similarly unpersuasive. Nowhere, in Knapp v. Commissioner, 23 T.C. 716 (1955), nor Krome v. Commissioner, 91 T.C.M. (CCH) 178 (1950), did the courts address whether a casualty loss deduction should be based on the calculation of damage to a grove in its entirety, or rather to smaller groups of trees within the grove. The court in Knapp did not even touch upon the problem at hand; the court held that the taxpayer could not deduct losses for damage to trees that were not planted at the time it acquired the grove, as those trees had no basis from which their post-casualty value could be deducted. See Knapp, 23 T.C. at 723.

The court in Krome, on the other hand, did uphold a formula used by taxpayers to calculate their casualty losses, and that formula appears to have required the determination of the extent of an individual tree's injury, expressed as a percentage of the tree's basis. However, the percentage losses for the individual trees were then utilized to yield a weighted average of loss suffered by the entire grove, measured as a percentage of the grove's basis. See id. at 185. Thus, the individual trees' measurement was used only as an intermediate step in the process of determining the amount of loss for the grove in its entirety. In that sense, Krome could be cited just as usefully by plaintiff.

More relevant to this court's inquiry are two cases cited by plaintiff: Weyerhauser Co. v. United States, 92 F.3d 1148 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 766 (1997), and Westvaco Corp. v. United States, 639 F.2d 700 (Ct. Cl. 1980). In Westvaco, the court addressed the proper economic unit by which to measure casualty losses in the timber context. The

IRS had argued for a relatively narrow interpretation of "single, identifiable property," by asking the court to consider the relevant property to be units "of merchantable timber contained in the merchantable trees suffering mortal injury" – i.e., essentially calculating the losses one tree at a time. Id. at 716. The court rejected this approach, ruling that all of the timber in an area, or "block," should be encompassed in the calculation of casualty losses. The court noted that, unlike individual trees, the block "remains constantly identifiable as a unit of property, having an identifiable adjusted basis unaffected by other such units." Id. at 717. "We hold," the court concluded, "that the single, identifiable property damaged or destroyed in the case of this plaintiff was all of the standing timber in the area of the individual district directly affected by each casualty." Id. at 720.

In Weyerhauser, again in the timber context, the IRS had defined the "single, identifiable property" as the "tree stand" - a smaller grouping of trees than the "block," and one in which the trees are "sufficiently homogenous to be distinguishable from adjoining growth." See Weyerhauser, 92 F.3d at 1150. The Court of Federal Claims upheld the IRS's interpretation, declining to follow Westvaco. See Weyerhauser, 32 Fed. C1. 80 (1994). The Court of Appeals for the Federal Circuit reversed, ruling that Westvaco controlled the case as binding precedent. See Weyerhauser, 92 F.3d at 1151. The court echoed the Westvaco court in extolling the logic of using "the same property unit for casualty loss purposes as had consistently been used for tax accounting purposes." Id. "[T]he correct rule," the Weyerhauser court explained, "is that the single, identifiable property is the depletion block when that property serves for commercial, forest management, and depletion purposes." Id.

Defendant discounts the relevance of Westvaco and Weyerhauser, given that both cases involve the application of regulations specific to the timber context. See Treas. Reg. § 1.611-3(d)(1) (1996) (providing for establishment of timber "blocks"). On the one hand, defendant is correct in the sense that those decisions do not control the outcome of this case due to the unique regulatory context in which they arose. On the other hand, however, the logical appeal of the reasoning underlying those court's decisions is by no means diminished by such relatively minor administrative peculiarities.

The holdings of both courts recognized the wisdom of allowing a taxpayer to its casualty losses by realistic economic units. The Westvaco court recognized the "block" as a "reasonable and logical and identifiable area affected by the casualty." Westvaco, 639 F.2d at 717. And the Weyerhauser

court implicitly accepted the taxpayer's argument that dividing its property into units smaller than blocks would be "a difficult, if not impossible, accounting task, and an unfair and unwarranted way of defeating the purpose of the law to permit deduction of casualty losses up to the adjusted basis of the property that experienced the loss." Weyerhauser, 92 F.3d at 1150. Further, the timber regulations themselves provide that blocks may be established in accordance with "geographical or political boundaries or by *logical management areas*." Treas. Reg. § 1.611-3(d)(1) (emphasis added). Thus, at the root of both courts' holdings is the idea that the economic unit by which a taxpayer's casualty losses are measured should be of a nature and scope that make practical sense.

At bottom, it is the practical sensibility behind plaintiff's position that compels us to adopt it. Plaintiff's basic argument, that the IRS has split "the grove down into unrealistic economic units" through its tree-by-tree approach, stems from the fact that, according to plaintiff, the individual trees themselves have no market value. Plaintiff claims that the grove in its entirety is the only unit with a realistic market value. Not surprisingly, a determination of market value is the ultimate objective of an appraisal conducted for casualty loss purposes. See, e.g., Treas. Reg. § 1.165-7(a)(2)(i) ("In determining the amount of loss deductible under this section, the fair market value of the property immediately before and immediately after the casualty shall generally be ascertained by competent appraisal.").

Defendant insists that using an individual tree as the economic unit does make sense as a method for calculating the casualty loss. In addition, defendant points out that plaintiff's appraisal was conducted by grouping the trees according to age and variety, that plaintiff admitted to then using a tree-by-tree approach in estimating the loss, and that "plaintiff is bound by the method it used." According to defendant, if plaintiff's tree-by-tree approach - as reflected by Husted's appraisals - were to be rejected by the court, "then plaintiff has not satisfied its burden of proving any deductible loss to the estate from the freeze." (emphasis in original).

In trying to hold plaintiff to a tree-by-tree approach, defendant has overlooked the function and purpose of plaintiff's individualized assessment of freeze damage to its trees. In conducting its appraisal, plaintiff did not treat the individual tree as the relevant economic unit. Plaintiff merely appraised the damage to various trees in order to determine the total grove loss inflicted by the freeze - in plaintiff's final analysis, the entire grove was unmistakably cast as the relevant economic unit. The calculated freeze loss for any

particular age or variety of tree was significant only as a component of the total grove loss; isolating those figures, as the IRS did in its determination of plaintiff's allowable deduction, removes them from any meaningful context, and underscores the fact that the individual trees ill-suited to be the unit by which plaintiff's casualty loss is measured.

This is best illustrated with reference to the appraisal's finding that several trees' post-freeze values were below zero. The conclusion that a group of trees has a value of below zero bears, at first glance, a tenuous relationship to everyday economics, and allowing a tax deduction based on that value may seem nonsensical. The validity of the below-zero figures becomes apparent, however, when the trees in question are acknowledged as small parts of a much larger whole. Basically, the trees' values were calculated by deducting the costs of production and harvesting from the expected income of the citrus. For certain trees, the costs exceeded the expected income due to freeze-induced delays in production, longer recovery periods, and lower expected returns for the fruit. If a grower could perform a cost-benefit analysis for each individual tree, then presumably the grower would not spend any more money on its care if future costs exceeded expected revenue. However, the grower cultivates the entire grove, and cannot simply pick and choose those trees for which continued care makes financial sense. The increased costs and reduced revenues brought about by the freeze are unavoidable, and are properly reflected in the negative values assigned to certain trees.

Further, the appraisal's results are understandably inaccurate when viewed on a per-tree basis. This stems from the averaging approach necessitated by the methods of appraisal. For example, in calculating the costs of cultivation, Husted included the average amount of fertilizer applied to each tree by the growers' automatic sprayer. In reality, the sprayer automatically senses the size of a particular tree and adjusts the amount of fertilizer applied accordingly. Applying an average figure thus leads to an overestimation of cultivation costs for some trees, and an underestimation for others; the average only leads to an accurate result when cultivation costs are considered for the grove in its entirety.

In light of the applicable law's common-sense approach to casualty loss calculation, the practical operation of plaintiff's citrus grove, and the purpose and method of plaintiff's appraisal, the court holds that the IRS, in disallowing the portion of plaintiff's deduction attributable to certain trees' negative post-freeze values, divided plaintiff's property into unrealistic eco-

nomic units. Under the facts of this case, the freeze damage inflicted on the entire grove must be considered in determining plaintiff's allowable deduction for casualty losses. Thus, the $39,895.07 disallowed by the IRS should be awarded to plaintiff.[6]

Conclusion

The court holds that plaintiff's QTIP election was invalid under § 2056(b)(7); the clerk is thus instructed to enter judgment in favor of defendant on that element of plaintiff's claim. Further, the court holds that the IRS improperly disallowed a portion of plaintiff's casualty loss deduction stemming from freeze damage to its citrus groves; the clerk is thus instructed to enter judgment in plaintiff's favor in the amount or $39,895.07, plus applicable interest.

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[6] In its response brief, plaintiff also allege that the IRS wrongfully disallowed $11,997 from plaintiff's claimed deduction - an amount given to plaintiff by the federal tree assistance program as compensation for freeze losses. Plaintiff claims that the money was applied against grove losses for later years, and so should not have been deducted from plaintiff's recovery. Regardless of how the money was applied, however, as long as plaintiff received the award as a result of its freeze losses, the IRS was correct to deduct the amount from plaintiff's refund claim. Under § 2054, a taxpayer is entitled to a deduction for only those casualty losses for which compensation has not otherwise been received.

In the United States Court of Federal Claims

No. 95-493 T

Filed: July 14, 1997

ESTATE OF CLYDE L. RINALDI,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

MODIFYING PUBLISHED OPINION

Upon further consideration, the court has determined that three revisions should be made to the court's opinion in this case dated July 11, 1997.

1. Revision of the text on page 15:

   The last sentence of the first full paragraph on page 15 should read as follows:

   Plaintiff here seeks to recover an amount representing the increased tax liability it incurred through the disallowed portion of its casualty loss.

2. Revision of the text on page 20:

   The last sentence of the final paragraph on page 20 should be deleted. Footnote 6 remains unchanged.

3. Revision of the text on page 21:

   The paragraph on page 21, titled "Conclusion" should read as follows:

   The court holds that plaintiff's QTIP election was invalid under § 2056(b)(7). Further, the court holds that the IRS improperly disallowed a portion of plaintiff's casualty loss deduction stemming from freeze

damage to its citrus groves; plaintiff's resulting recovery will be determined by applying the appropriate estate tax rate to the reinstated deduction of $39,895.07. The entry of judgment is postponed pending the parties' stipulation regarding certain administrative and interest expenses.

John P. Wiese
Judge

In the United States Court of Federal Claims

No 95-493 T

ESTATE OF CLYDE L. RINALDI,
Plaintiff,
v

THE UNITED STATES,
Defendant

Pursuant to the court's July 11, 1997, published Opinion; its Order modifying published opinion dated July 14, 1997; and the parties' December 30, 1997, Stipulation as to Amount of Judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff, Estate of Clyde L. Rinaldi, shall recover of and from the United States the sum of $39,375.10 in estate taxes, plus assessed interest of $15,017.63, and interest thereon according to law. Each shall bear its own costs.

David A. Lampen
Clerk of Court

December 31, 1997 By:

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

In the United States Court of Federal Claims

NO.: 95-CV-493

ESTATE OF CLYDE L. RINALDI,
Plaintiff

v

THE UNITED STATES OF AMERICA,
Defendant

MOTION OF PLAINTIFF, ESTATE OF CLYDE L. RINALDI FOR RELIEF OF JUDGMENT AND FURTHER RELIEF UNDER THE PROVISIONS OF RULE 60(b)(1)

Plaintiff, Estate of Clyde L. Rinaldi, respectfully moves the Court under the provisions of Rule 60 (b) of this Court for relief from the Final Judgment of this Court entered under date of January 11, 1998, and for the reasons that that Judgment is now, because of a mistake of law resulting from a change of legal position by the Defendant, subject to correction and to the relief of Plaintiff from that judgment; and to appropriate correction: and for the reasons given in the following statements of this Motion.

STATEMENT OF THE CASE

There follows a chronological list of pertinent litigation events:

December 31, 1997: Opinion of the Court of Federal Claims
January 11, 1998: Judgment of the Court of Federal Claims
January 30 1998: Filing of Notice of Appeal to the United States Court of Appeals for the Federal Circuit
June 25, 1998: Filing of Plaintiff-Appellant's Reply Brief in the Court of Appeals for the Federal Circuit
August 18, 1998: Treasury Decision 8779 was filed with the Federal Register
September 2, 1998: Estate of Clyde L. Rinaldi filed a new QTIP election invited under T.D. 8779, and reported that action to the Court of Appeals for the Federal Circuit.
November 13, 1998: The Court of Appeals for the Federal Circuit issued its Decision, relying entirely on the December 31, 1997

Opinion of the Court of Federal Claims.
November 20, 1998: Plaintiff -Appellant filed its Petition for Rehearing in the Court of Appeals for the Federal Circuit.

POINT OF LAW

Rule 60 (b) of the Rules of the Court of Federal Claims permits the filing of this Motion, for mistake.

Mistake includes mistake of law. (Lairsey v. Advance Abrasives Co., 542 F2d 928, (CA5, 1976)

The Defendant's responsible agency, Treasury Department has now admitted its error of law, and given the right to a revised election proceeding, which has been accepted by the Plaintiff-Appellant.

The QTIP election that was invited by T.D. 8779 was filed in the Estate of Clyde L. Rinaldi under date of September 2, 1998 with the Internal Revenue Service, a copy as filed is attached as Exhibit A.

ARGUMENT

That T.D. 8779 changes the law relating to IRC §2056(b)7 is apparent from the summary:

> "SUMMARY: This document contains final regulations amending the estate tax marital deduction regulations. The amendments are made to conform the estate tax regulations to recent court decisions in Estate of Clayton v. Commissioner, 976 F2d 1486 (5th Cir. 1992), rev'g 97 T.C. 327 (1991); Estate of Robertson v. Commissioner, 15 F3d 779 (8th Cir. 1994), rev'g 98 T.C. 678 (1992); Estate of Spencer v. Commissioner, 43 F3d 226 (6th Cir. 1995), rev'g T.C. Memo 1992-579: and Estate of Clack v. Commissioner, 106 T.C. 131 (1996). The amendments affect estates of decedents electing the marital deduction for qualified terminable interest property (QTIP) and the estates of the surviving spouses of such decedents."

That this contains information inviting taxpayer action to correct previous error is apparent from the language In the Paperwork Reduction Act section:

> "The collection of information in this regulation is in

> §20.2056(b)-7(d) (3) (ii). This information is required to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property election under section 2056(b) (7) (B) (v). This information will be used to inform the IRS of the affected estates that are electing to obtain the relief granted in the regulation. The collection of information is mandatory for those estates that seek relief. The likely respondents are individuals representing estates."

That T.D. 779 deals specifically with a central statutory problem is admitted. But that problem is one of a pattern of like problems, all dealing with situations where an act of the estates of the surviving spouses "might not" (as a possibility) retain all of the property elected into the QTIP. The problem is exactly the same, and so is the remedy. That is the remedy offered in this Treasury Decision.

The cited Tax Court case of Estate of Clack, 106 T.C. 131, illustrates the breadth of the decision-making process. Judge Swift's concurring Opinion agrees with and refers to "the refreshingly straightforward and common sense approach of the Court of Appeals for the Sixth Circuit in Estate of Spencer v. Commissioner", a case also relied on in T.D. 8779. That decision unequivocally determines that the date of the election is the proper date to determine if the property in the Trust meets the QTIP requirement. (Clack, p 144; Spencer, 43 F3d pp 230-233)

Furthermore, the right to elect given by T.D. 8779, is not restricted, see Exhibit A; and such an election has been made and not rejected.

Remand under Rule 60.1. Because the Internal Revenue Service has invited a response by the Estate to T.D. 8779, it may be appropriate to remand under Rule 60.1 to permit any appropriate revision or correction of the election as made by the Estate of Clyde L. Rinaldi.

Respectfully submitted.

GEORGE W. ERICKSEN, ESQUIRE
POST OFFICE30X 172238
TAMPA, FLORIDA 33672
(813) 223-7803
FLORIDA BAR NO. 022873

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Elizabeth D. Seward, Esquire, U.S. Department of Justice, Tax Division, Court of Federal Claims Section, Post Office Box 26, Ben Franklin Station, Washington, D.C. 20044 and Edward T. Perelmuter, Attorney, Appellate Section, Department of Justice, Tax Division Appellate Section, Post Office Box 502, Washington 20044, on this 1st day of December, 1998.

GEORGE W. ERICKSEN, ESQUIRE

QTIP ELECTION UNDER T. D. 8779

ESTATE OF CLYDE L. RINALDI
SOC. SEC. NUMBER: 265-05-3528
D.O.D.: NOVEMBER 25, 1988

This is an election, under T.D. 8779, by W. Stephens Rinaldi, as Personal Representative of the Estate of Clyde L. Rinaldi, deceased, with respect to the Terminable Interest Property described in article IV of the Will of Clyde L. Rinaldi, or so much of that property so described as is properly terminable interest property, specifically excluding any property in which any person other than the surviving spouse may at any time have or obtain an interest in income or principal of the Nelle M. Rinaldi Trust which would pass to or be for the benefit of beneficiaries other than the surviving spouse.

Specifically, the Internal Revenue Service did determine that the exercise of a right by the Trustee of the Trust to a conditional later purchase of the shares of Rinaldi Printing Company stock in the Trust at "book value" would give rise to a "bargain sale", and the dollar value of that "bargain", if any, is specifically so excluded.

This election replaces the election previously made on the Form 706 as filed, and subsequently invalidated by the Internal Revenue Service. A claim for refund was filed on or about June 13, 1993, and proceedings thereafter in the United States Court of Federal Claims, resulting in a Judgment on this issue against the Taxpayer on Defendant's Summary Judgment proceeding, followed by the appeal of the Estate into the United States Court of Appeal for the Federal Circuit noticed under date of January 30, 1998, which Appeal is pending.

Consequently, this cause is still open for filing this revised election under the principles enunciated in Treasury Decision 8779, filed August 18, 1998.

The elector, the Personal Representative of the Estate of Clyde L. Rinaldi, and the surviving spouse of Clyde L. Rinaldi, Nelle M. Rinaldi, do hereby join in affirming that the surviving spouse's gross estate will include the value, at the date of the surviving spouse's death, of the property for which the QTIP election herein is being made.

Dated: September 1, 1998

Executed under penalty
of perjury:

NELLE M. RINALDI
Surviving spouse of
Clyde L. Rinaldi

Executed under penalty
of perjury:

W. STEPHENS RINALDI
Personal Representative of the
Estate of Clyde L. Rinaldi

W. STEPHENS RINALDI
Trustee of the Testamentary
Trust of the "NELLE M.
RINALDI TRUST"; under the
Will of Clyde L. Rinaldi

EXHIBIT A

In the United States Court of Federal Claims

No. 95-493 T

(Judge Wiese)

ESTATE OF CLYDE L. RINALDI,
Plaintiff,

v

THE UNITED STATES,
Defendant.

RESPONSE OF THE UNITED STATES TO PLAINTIFF'S MOTION FOR RELIEF UNDER RCFC 60(b)(1)

On December 1, 1998, plaintiff served a motion for relief of judgment herein pursuant to RCFC 60(b)(l) on the ground that Treasury Decision 8779, issued on August 19, 1998, changed the law with respect to Qualified Terminable Interest Property ("QTIP") elections, and accordingly, plaintiff is entitled to relief. Plaintiff attached as Exhibit 1 to its motion revised QTIP election purportedly filed with the Internal Revenue Service on September 2, 1998. Plaintiff's request is wholly without merit, and should be denied.

A brief review of the history of this case is in order. On July 11, 1997, this Court published an opinion, reported at 38 Fed. C1. 341, which was amended on July 14, 1997, denying plaintiff's claim to a QTIP deduction and allowing its citrus grove freeze loss deduction. On December 30, 1997, the parties stipulated the amount of the judgment be entered, and on December 31, 1997, the Court entered judgment accordance with the parties' stipulation. Thereafter, on February 2, 1998, plaintiff appealed the adverse QTIP decision to the Court of Appeals for the Federal Circuit. (See Federal Circuit docket sheet attached hereto as Exhibit 1.) After briefing and argument, the court of appeals, in an unpublished decision, affirmed this Court's holding on the basis of its "thorough and well-reasoned opinion...." (Fed. Cir. Decision, filed November 13, 1998, Exhibit 2 hereto.)

Subsequently, on November 23, 1998, plaintiff filed a Petition for Rehearing in the Federal Circuit. (Exhibit 3 hereto.) There, it advanced the

same argument it posits here, to wit: that the issuance of T.D. 8779, which amends the estate tax marital deduction regulations to conform them to recent decisional law, somehow represents a Government admission of a "mistake of law," entitling plaintiff to revise its QTIP election (made nine years ago) pursuant to Rule 60(b)(1). The Federal Circuit summarily denied plaintiff's petition on December 8, 1998.

The issue originally presented on appeal was whether the estate's election of a marital trust as QTIP was valid under § 2056(b)(7) when, under the terms of the will, the shares of stock from the family's printing company that funded the trust could be sold the testator's son at a bargain price when he no longer wished to manage the company, thus defeating the surviving spouse's income interest in the shares to the extent of the difference between their book and fair market values. On plaintiff's federal estate tax return, the executor elected QTIP for the printing company shares. Approximately 45 days later, the printing company redeemed the shares from the marital trust and retired them. Under § 2056(b) (7) (B) (ii), no person may have the power to appoint any part of QTIP to any person other than the surviving spouse, unless the power is exercisable at or after the surviving spouse's death. Further, once made, a QTIP election is irrevocable.

§ 2056(b) (7) (B) (v).

This Court held that the marital trust was ineligible for the QTIP marital deduction because the will subjected the trust's value to diminution through the potential sale of the stock at a bargain price to someone other than the surviving spouse. In so holding, it rejected plaintiff's claim that the only defect in the testamentary trust provisions had been cured by the substitution of cash for the shares of stock, observing that it is the possibility, rather than the probability, that an interest will terminate that determines whether a surviving spouse has a qualifying income interest for life in the corpus. The Court observed further that the terms of the will govern eligibility, and that the portion of the corpus potentially lost in a bargain sale would escape taxation in the estates of both the decedent and his surviving spouse, the very thing the Internal Revenue Code's QTIP provisions – §2056(b) (7) and 2044 – were designed to avoid. The Court also concluded that while QTIP eligibility reasonably should be measured as of the date the executor makes the election, see, e.g., Estate of Spencer v. Commissioner, 43 F.3d 226, 231 (6th Cir. 1995), in this case that determination made no difference because the terms of the will itself subjected the trust's value to diminution.
RCFC 60(b)(1) provides as follows:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;...The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

See generally, James Wm. Moore, 12 Moore's Federal Practice § 60.41 (1998); Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 11 Federal Practice and Procedure: Civil 2d § 2858 (1995 & Supp. 1998).

There are a number of problems with the relief plaintiff seeks, both procedural and substantive. In the first place, the correction of a legal error is fully provided for by the avenue of an appeal, and plaintiff has fully pursued its right of appeal of the Court's adverse QTIP decision in the Federal Circuit. A Rule 60(b)(l) motion is thus not intended as a substitute for appeal. See Alvestad v. Monsanto, 670 F.2d 908, 912-13 (5th Cir 1982). While the courts of appeals are divided on the question such a motion is a proper vehicle for seeking to correct a mistake of law, even the favorable Second Circuit has concluded that a Rule 60(b)(l) motion filed after the time has elapsed for appealing a decision is not filed within a "reasonable" time as required by the rule. Compare Schildhaus v. Moe, 335 F.2d 529, 531 (2d Cir. 1964) ("nothing in the rule, the cases, or the treatises suggests that a motion for relief from Judicial error more than eight months after the entry of judgment is made 'within a reasonable time' as the Rule requires"), and Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir. 1985) (recognizes claim of legal error as "mistake" subsumed under Rule 60(b) (l); motion must be brought within normal time allowed for filing an appeal), with Hoult v. Hoult, 57 F.3d 1, 5 (1st Cir. 1995) (even if district court decides point of law incorrectly, that "is not grounds for relief under rule 60(b)", and Smith v. Evans, 853 F.2d 155, 156, 158-59 (3rd Cir. 1988) ("the motion alleges no more than legal error..."). But see Lairsev v. Advance Abrasives Company, 542 F.2d 928 (5th Cir. 1976) (cited by plaintiff; Fifth Circuit expressly recognizes power in the district courts to consider and deny a Rule 60(b) motion on the merits after a notice of appeal has been filed, because the trial court's action is in furtherance of the appeal).

Here, plaintiff's belated Rule 60 (b) (1) motion was served on December 1, 1998, a full ten months after filing its appeal in the Federal

Circuit, and 18 days after the Federal Circuit had ruled on its appeal. Moreover, plaintiff's rights of appeal are not yet foreclosed: it has 90 days from the November 13, 1998, Federal Circuit decision to petition for a writ of certiorari to the United States Supreme Court from the Federal Circuit's affirmance and advance therein its view that a mistake of law has occurred requiring reversal and remand. S. Ct. R. 13.

Second, and more fundamental, the premise on which plaintiff's motion rests, i.e., that there has been a change in the law requiring relief, is utterly without foundation. Treasury Decision 8779, 63 Fed. R. 44391 (August 19, 1988, Exhibit 4 hereto) does no more than conform the existing estate tax regulations to a number of circuit court decisions holding that eligibility of assets for QTIP treatment is determined as of the date the election is made on the estate tax return. See Spencer; Estate of Robertson v. Commissioner, 15 F.3d 779 (8th Cir. 1995); Estate of Clayton v. Commissioner, 976 F.2d 1486 (5th Cir, 1992); Estate of Clack v. Commissioner, 106 T.C. 131 (1996). In each of these cases, the testitor's will did not designate specific property to receive the marital deduction as qualified terminable interest property, but rather left the designation of such property to the discretion of his estate's executor. The courts ruled in such circumstances that the designation of property to be subject to a QTIP election could be made after the testator's death. T.D. 8779 conforms to the above cases, stating in relevant part (63 Fed. R. 44392), "The final regulation is clarified to provide that an interest in property is eligible for treatment as qualified terminable interest property if the income interest is contingent upon the executor's election and if that portion of the property for which no election is made will pass to or for the benefit of beneficiaries other than the surviving spouse."

This Court fully considered Spencer, Robertson, and Clayton in its July 11, 1997, opinion, explaining that (38 Fed. C1. 341, 346-48)–

[A]ccepting the holdings of those courts does not invariably lead to a finding for plaintiff in this case. The factual circumstances on which the reasoning of Spencer and its progeny were based differ dramatically from the circumstances presented by the case at hand. In Spencer, for example, the terms of the testator's will clearly established a valid QTIP trust – the only ambiguity stemmed from the discretion granted to the executor to decide what amount of property to contribute to the trust. See 43 F.3d at 227.

In this case, by contrast, the trust established by the terms of Rinaldi's will was clearly ineligible for QTIP treatment – the will explicitly subject-

ed the trust's value to diminution through the potential sale of its assets at a bargain price to someone other than the surviving spouse. . . .

The difficulty with accepting plaintiff's characterization stems from the means by which the trust's defect was allegedly remedied. The trust may indeed have rid itself of the troublesome stock in question; what remains unchanged, however, are the terms of the will that rendered the trust ineligible for QTIP treatment in the first place. [Emphasis supplied.][1]

Thus, the fact that the IRS has now conformed its regulations to decisional law this Court already has considered and determined is not dispositive does not require relief under Rule 60(b). The problem here is not that no assets were identified in the testator's will as QTIP assets, but that the will itself contained provisions that could potentially defeat the surviving spouse's income interest in the trust. The Treasury Decision has no effect on the defective terms of Clyde Rinaldi's will.

Further, plaintiff's attempted, revised "QTIP election" (Mot. Ex. A) cannot undo the specific terms of the testator's will regarding the operation of the Nelle M. Rinaldi trust. As this Court explained (38 Fed. C1. At 349)

> Plaintiff is asking this court to judge property's QTIP eligibility solely on the basis of the factual circumstances in place at the time of the executor's election, regardless of the specific terms of the testator's will. Under plaintiffs approach, ad hoc measures enacted after the testator's death by the executor would effectively negate the memorialized intent of the testator, no matter how contrary that intent was to the letter and spirit of the QTIP requirements. In Spencer, Clayton, and Robertson, the testators' memorialized intent was to allow their executors to decide whether or not to elect QTIP status as to a particular asset – importantly, however, every aspect of their wills' terms was consistent with QTIP eligibility. Here, in contrast, Rinaldi's explicit intent was to allow his wife's trust to operate in a manner clearly inconsistent with § 2056(b)(7)'s criteria. To say the least, it would take a generous reading of tax law by the court to extract a legally viable QTIP trust from the facially invalid framework set forth by the testator.

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[1] The United States, as appellee, fully addressed these decisions, as well as Estate of Clack v. Commissioner, 106 T.C. 131 (1996), on appeal. See Estate of Clyde L. Rinaldi v. United States, Docket No. 98-5064, Brief for the Appellee (filed June 9, 1998).

Finally, plaintiff's purported, revised election is void as a matter of law. First, as noted supra 3, once made, a QTIP election is irrevocable. § 2056(b)(7)(B)(v). Thus, plaintiffs QTIP election, made on Schedule M of its estate tax return in 1989 (see DPF 19-20),[2] cannot be amended.

Second, the Treasury Decision on which plaintiff relies explains (63 Fed. R. 44392) that the estates of decedents whose returns were due on or before February 18, 1997, have an extension of time to make a QTIP election under certain circumstances. Treas. Reg. 20.2056(b)-(7)(d)(3)(ii) provides (63 Fed. R. 44393) that such estates, which have not made an election previously, are granted an extension of time to make the election so long as the period of limitations for filing a refund claim has not expired, generally the later of three years from the date the estate tax return was filed or two years from the date of a subsequent payment sought to be refunded. § 6511(a). Of course, this provision is inapplicable to plaintiff, who made its irrevocable QTIP election on its estate tax return in 1989. (DPF 19.)

For the foregoing reasons, defendant requests that the Court forthwith deny plaintiff's motion for relief under Rule 60(b)(l). Defendant also requests costs.

Respectfully submitted,

ELIZABETH D. SEWARD
Attorney of Record
U.S. Department of Justice
Tax Division l
Court of Federal Claims Section
Il Post Office Box 26
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6508

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[2]The term "DPF" refers to Defendant's Proposed Findings of Uncontroverted filed on January 28, 1997.

LORETTA C. ARGRETT
Assistant Attorney General
MILDRED L. SEIDMAN
Chief, Court of Federal Claims
Section

STEVEN I. FRAHM
Senior Trial Attorney

Of Counsel

Date 12/18/98

In the United States Court of Federal Claims

Judge John P. Wiese

Lower Court/Agency #: 95-CV-493
Notice of Appeal and Certified List Received: 02/02/98
Notice of Appeal Filed: 02/02/98
Docketed and Notice Sent to Parties: O2/04/98[JLA]
Certified List Filed: 02/02/98

Fee Paid: 02/02/98 Fee Amount: 105.00 Receipt No: 044918

Plaintiff-Appellant
ESTATE OF CLYDE L. RINALDI

George Ericksen
P.O. Box 172238
Tampa, FL 33672
Phone #: 813/223-7803
EOA Filed: 02/17/98
Principal Attorney

Defendant-Appellee
UNITED STATES

Edward T. Perelmuter
Department of justice
P.O. Box 502
Washington, DC 20044
Phone #: 202/514-3769
EOA Filed: 06/12/98
Principal Attorney

Richard Farber
Department of Justice
EOA Filed: 06/11/98

II

II

EXHIBIT 1

ESTATE OF CLYDE L. RINALDI (APPELLANT) – BRIEF FOR PLAINTIFF-APPELLANT ESTATE OF CLYDE L. RINALDI (MS-04/06/98). FILED 04/06/98. (986349) (EOD 04/08/98 BY NLJ) 98-5064

1. Appellee - MOTION FOR EXTENSION OF TIME FOR FILING APPELLEE'S BRIEF. (MS-05/11/98) FILED: 05/11/98. ON CONSENT. ACTION ON MOTION (2): GRANTED. BY CLERK. FILED: 05/13/98. (EOD 05/13/95 BY JB) THE BRIEF: IS DUE ON 06/09/98. 98-5064

UNITED STATES (APPELLEE) – BRIEF FOR THE APPELLEE UNITED STATES (MS-06/09/98). FILED: 06/09/98. (986880) (EOD 06/15/98 BY JLA) 98-5064

ESTATE OF CLYDE L. RINALDI (APPELLANT) – REPLY BRIEF FOR PLAINTIFF-APPELLANT ESTATE OF CLYDE L. RINALDI (MS-06/25/98). FILED 06/25/98. (987028) (EOD 06/29/98 BY JLA) 98-5064

ESTATE OF CLYDE L. RINALDI (APPELLANT) – JOINT APPENDIX (MS-07/02/98). FILED: 07/02/98. (987084) (EOD 07/06/98 BY JLA) 98-5064

3. APPELLANT'S NOTICE OF CITATION OF SUPPLEMENTAL AUTHORITY. (MERITS PANEL) (MS-09/02/98) RECEIVED: 09/08/98 (EOD 09/09/98) (LP) 98-5064

September 21, 1998	NOTICE OF CALENDARING issued. Panel 9811K on November 5, 1998
98-5064 (KSH)	
November 5, 1998	Submitted after ORAL ARGUMENT by George W. Ericksen and Edward T. Perelauter.
98-5064 (KSH)	(RICH, RADER and SCHALL)

5. APPELLEE'S SUBMISSION OF A COPY OF A CASE CITED AT THE ORAL ARGUMENT. (SENT TO THE PANEL) (MS-11/10-98) RECEIVED: 11/10/98 (EOD 11/12/98) (AV) 98-5064

AFFIRMED. (PER CURIAM). NONPRECEDENTIAL OPINION. JUDGMENT ENTERED: 11/13/98. COSTS AGAINST APPELLANT. (EOD 11/13/98 BY KSH) 98-5064

6. APPELLANT'S LTR TO COURT REGARDING INFORMATION BROUGHT UP DURING ORAL ARGUMENT. (SEN TO PANEL) (MS-11/13/98) RECEIVED 11/16/98 (EOD 11/16/98) (LP) 98-5064

PETITION FOR REHEARING (NPF) (MS-11/20/98) FILED: 11/23/98 PETITION CIRCULATED: 11/24/98 PETITION: DENIED ON 12/08/98. (EOD 12/08/98 BY AV) 98-5064

ADDENDUM

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-5064

ESTATE OF CLYDE L. RINALDI,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: November 13, 1998 11

II

Before RICH, RADER, and SCHALL, Circuit Judges.

PER CURIAM.

DECISION

The Estate of Clyde L. Rinaldi appeals from of the United States Court of Federal Claims granting summary judgment in favor of the government. Estate of Rinaldi v United States, No. 95-94T On the basis of the thorough and well-reasoned opinion of the Court of Federal Claims, we affirm.

EXHIBIT 2

United States Court of Appeals for the Federal Circuit

A98-5064

ESTATE OF CLYDE L. RINALDI,
Plaintiff-Appellee,

v

UNITED STATES,
Defendant-Appellee,

PETITION FOR REHEARING

The Plaintiff-Appellant respectfully petitions this Court for rehearing.

POINTS OF LAW

FIRST POINT: The Court's decision relies specifically on the Court of Federal Claims Opinion' dated December 31, 1997. The Defendant-Appellee's position on QTIP elections changed radically on August 18, 1998. The Court's legal position must follow the Defendant-Appellee's legal position as it currently exists.

SECOND POINT: The Court should refer to the continuing of the right of the Plaintiff-Appellant to charge litigation costs and expenses as administrative deductions for estate tax purposes.

ARGUMENT

Two matters are considered to be the most significant.

FIRST ARGUMENT. This Court's Decision to Affirm is based on the opinion of the Court of Federal Claims, which was filed July 11, 1997.

More than one year later, under date of August 18, 1998, the Treasury Department and its Internal Revenue Service have issued Treasury Decision 8779, which has substantially reversed the Government' s position in cases

of the character of Estate of Rinaldi, and authorized new QTIP elections. The Court of Federal Claims did not have this information available. A new election has now been filed by the Plaintiff-Appellant, copy filed in this Court under our Notice of Supplemental Authority.

If. T.D. 8779 had not changed the law, there would be no point at all in allowing older estates now to make QTIP elections. But T.D. 8779 states:

> "Accordingly, the final regulations provide that estates of decedents whose estate tax returns were due on or before February 18, 1997, are granted an extension of time to make the QTIP election if (1) the period, limitations on filing a claim for credit or refund under Section 6511(a) has not expired; and (2) the estate submits a statement providing that, pursuant to section 2044, the surviving spouse's gross estate will include the value, at the date of the surviving spouse's death, of the property for which the QTIP election is being made. The statement must be signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased)."

The time has expired to file a Rule 60(b) motion, but the same equitable result may be obtained by remanding to the Court of Federal Claims for consideration of this change of law in the application of its Opinion and Judgment (See Lairsev v. Advance Abrasives Co., 542 F2d 928, (CA5, 19761) for purposes of Rule (60(b)).

The client of the Department of Justice has changed position radically since the issuance of the Opinion of the Court of Federal Claims. The Department of Justice should admit this and agree that the case should be sent back to be considered in the light of the radical change of position of its client, for consistency of administration under T.D. 8799, and a proper conclusion of this case.

SECOND ARGUMENT. The Notice of Appeal dated January 30, 1998 clarified that by agreement all litigation costs are deductions for the calculation of estate taxes, including Plaintiff-Appellant's costs on appeal. This should be expressed. If precise amounts are necessary, the fees of Plaintiff-Appellant are $18,620 and costs are $4,990.76; and costs of Defendant-Appellee should be added when available.

CONCLUSION

The relief requested is respectfully urged.

Dated this 20th day of November, 1998.

GEORGE W. ERICKSEN, ESQUIRE
POST OFFICE BOX 172238
TAMPA, FLORIDA 33672
(813)223-7803
FLORIDA BAR NO. 022873
ATTORNEY FOR PLAINTIFF-APPELLANT

A-49/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Edward T. Perelmuter, Attorney, Appellate Section, Department of Justice, Tax Division Appellate Section, Post Office Box 502, Washington, DC 20044, on this 20th day of November, 1998.

GEORGE W. ERICKSEN, ESQUIRE

Citation
63 FR 44391-01
1998 WL 482658 (F.R.)
(Cite as: 63 FR 44391)

Search Result

Rank 1 of 1

Database
FTX-TD

RULES and REGULATIONS

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20 and 602

[TD 8779]

RIN 1545-AU27

Estate and Gift Tax Marital Deduction

Wednesday, August 19, 1998

***44391** AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations amending he estate tax marital deduction regulations. The amendments are made to conform the estate tax regulations to recent court decisions in Estate of Clayton v. Commissioner, 976 F.2d 1486 (5th Cir. 1992), rev'g 97 T.C. 327 (1991); Estate of Robertson v. Commissioner, 15 F.3d 779 (8th Cir. 1994), rev'g 98 T.C. 678 (1992); Estate of Spencer v. Commissioner, 43 F.3d 226 (6th Cir. 1995), rev'g T.C. Memo. 1992-579; and Estate of Clack v. Commissioner, 106 T.C. 131 (1996). The amendments affect estates of decedents electing the marital deduction for qualified terminable interest property (QTIP) and the estates of the surviving spouses of such decedents.

DATES: These regulations are effective August 19, 1998.

FOR FURTHER INFORMATION CONTACT: Susan B. Hurwitz, (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information in these final regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned control number 1545-1612.

An agency may not conduct or sponsor, and a person is not required to respond to, collection of information unless the collection of information displays a valid control number assigned by OMB.*44392

The collection of information in this regulation is in §20.2056 (b) -7 (d) (3) (ii). This information is required to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property election under section 2056 (b) (7) (B) (v). This information will be used to inform the IRS of the affected estates that are electing to obtain the relief granted in the regulation. The collection of information is mandatory for those estates that seek relief. The likely respondents are individuals representing estates.

Comments concerning the collection of information should be directed to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Any such comments should be submitted not later than October 19, 1998. Comments are specifically requested concerning: Whether the collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility.

The accuracy of the estimated burden associated with the collection of information (see below);

How to enhance the quality, utility, and clarity of the information collected;

How to minimize the burden of complying with the collection of information, including the application of automated collection techniques or

other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Estimates of the reporting burden in these final regulations will be reflected in the burden of Form 843 (Claim for Refund and Request for Abatement) and Form 706 (Estate Tax Return) or 706NA (Estate Tax Return for Nonresident Noncitizens)

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 20 and 602 are amended as follows:

PART 20 – ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 20.2044-1, paragraph (e), Example 8 is added to read as follows:

§20.2044-1 Certain property for which martial deduction was previously allowed.

* * * *

(e) * * *

Example 8. Inclusion of trust property when surviving spouse dies

before first decedent's estate tax return is filed. D dies on July 1, 1997. Under the terms Of D'S will, a trust is established for the benefit of D's spouse, S. The will provides that S is entitled to receive the income from that portion of the trust that the executor elects to treat as qualified terminable interest property. The remaining portion of the trust passes as of D's date of death to a trust for the benefit of C, D's child. The trust terms otherwise provide S with a qualifying income interest for life under section 2056 (b) (7) (B) (ii). S dies on February 10, 1998. On April 1, 1998, D's executor files D's estate tax return on which an election is made to treat a portion of the trust as qualified terminable interest property under section 2056(b) (7) S's estate tax return is filed on November 10, 1998. The value on the date of S's death of the portion of the trust for which D's executor made a QTIP election is includible in S's gross estate under section 2044.

§20.2044-1T [Removed]

Par. 3. Section 20.2044-1T is removed.

Par. 4. In §20.2056 (b) -(7), paragraphs (d) (3) and (h) Example 6 are revised to read as follows:

§20.2056 (b) -(7) Election with respect to life estate for surviving spouse.

* * * *

(d) * * *

(3) Contingent income interests. (i) An income interest for a term of years, or a life estate subject to termination upon the occurrence of a specified event (e.g., remarriage), is not a qualifying income interest for life. However, a qualifying income interest for life that is contingent upon the executor's election under section 2056 (b) (7) (B) (v) will not fail to be a qualifying income interest for life because of such contingency or because the portion of the property for which the election is not made passes to or for the benefit of persons other than the surviving spouse. This paragraph (d) (3) (i) applies with respect to estates of decedents whose estate tax returns are due after February 18, 1997. This paragraph (d) (3) (i) also applies to estates of decedents whose estate tax returns were due on or before February 18, 1997, that meet the requirements of paragraph (d) (3) (ii) of this section.

(ii) Estates of decedents whose estate tax returns were due on or before February 18, 1997, that did not make the election under section 2056 (b) (7)

(B) (v) because the surviving spouse's income interest in the property was contingent upon the election or because the nonelected portion of the property was to pass to a beneficiary other than the surviving spouse are granted an extension of time to make the QTIP election if the following requirements are satisfied:

(A) The period of limitations on filing a claim for credit or refund under section 6511(a) has not expired.

(B) A claim for credit or refund is filed on Form 843 with a revised Recapitulation and Schedule M, Form 706 (or 706NA) that signifies the QTIP election. Reference to this section should be made on the Form 843.

(C) The following statement is included with the Form 843: "The undersigned certifies that the property with respect to which the QTIP election is being made will be included in the gross estate of the surviving spouse as provided in section 2044 of the Internal Revenue Code, in determining the federal estate tax liability on the spouse's death." The statement must be signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased).

* * * *

(h) * * *

Example 6. Spouse's qualifying income interest for life contingent on executor's election. D's will established a trust providing that S is entitled to receive the income, payable at least annually, from that portion of the trust that the executor elects to treat as qualified terminable interest property. The portion of the trust which the executor does not elect to treat as qualified terminable interest property passes as of D's date of death to a trust for the benefit of C, D's child. Under these facts, the executor is not considered to have a power to appoint any part of the trust property to any person other than S during S's life.

* * * *

§20.2056 (b) -7T [Removed]

Par. 5. Section 20.2056 (b) -7T is removed.

Par. 6. Section 20.2056 (b) - 10 is revised to read as follows:

§20.2056(b)-10 Effective dates.

Except as specifically provided in 820.2 056 (b) -5 (c) (3) (ii) and (111), 20.2056 (b) -7(d) (3), 20.2056 (b) -7 (e) (5), and 20.2056 (b) -8(b), the provisions of §20.2056 (b) -5 (c), 20.2056 (b) -7, 20.2056 (b) -8, and 20.2056 (b) -9 are applicable with respect to estates of decedents dying after March 1, 1994. With respect to decedents dying on or before such date, the executor of the decedent's estate may rely on any reasonable interpretation of the statutory provisions.

§20.2056 (b) -10T [Removed]

Par. 7. Section 20.2056 (b) -10T is removed.

PART 602 – OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. In §602.10l, paragraph (c), the entry in the table for 20.2056 (b) -7 is revised to read as follows:

§602.101 OMB Control numbers.

* * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
20.2056 (b) -7	1545-0015 1545-1612

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

Approved: July 27, 1998.

Donald C. Lubick,

Assistant Secretary of the Treasury.

[FR Doc. 98-22089 Filed 8-18-98; 8:45 am]
BILLING CODE 4830-01-U

63 FR 44391-01, 1998 WL 482658 (F.R.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I certify that service of the foregoing document has been made on opposing counsel this 18th day of December, 1998, by mailing a copy thereof, in a postage prepaid envelope, to the following address:

George W. Ericksen, Esquire
P.O. Box 172238
Tampa, Florida 33672

Diana L. Henderson
U.S. Department of Justice
Tax Division
Court of Federal Claims Section
Post Office Box 26
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6440_

In the United States Court of Federal Claims

No. 95-CV-493

ESTATE OF CLYDE L. RINALDI,
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

MOTION TO STRIKE RESPONSE OF THE DEFENDANT, UNITED STATES TO PLAINTIFF'S MOTION FOR RELIEF UNDER THE PROVISIONS OF RULE 60 (B) (1)

Plaintiff, Estate of Clyde L. Rinaldi, moves to strike the Response of the Defendant, United States to Plaintiff's Motion for Relief under the provisions of Rule 60 (B) (1) for the following reasons:

1. The Constitutional doctrine of Separation of Powers demands that the Executive Department complete its functions to a conclusion before the Judicial Department starts its trial proceedings.

2. Remanding to the Executive Department is provided by Rule 60.1 to this purpose.

3. It is admitted that the United States Court of Federal Claims is a Title I Court, not a Title III Court; but it has adopted complete Rules of Court, comparable to the Federal Rules of Civil Procedures, operates in all of its activities as a Federal Court of Records, is appealable to the Court of Appeals for the Federal Circuit, and in way other respects claims judicial status. There is, therefore no reason why the doctrine should not apply.

4. It is particularly appropriate for the Executive Department to complete its functions in the instant case because of the legislative changes to taxpayer rights since the start of this litigation. See e.g. Section 1331, IRS Restructuring and Reform Act of 1998.

5. The Plaintiff is a subject of the provisions of T.D. 8779. In particular, the acts of a taxpayer are irrevocable if the taxpayer did not reverse them.

When amended by the Department, they are simply dead, as though they never were performed.

Respectfully submitted.

GEORGE W .ERICKSEN, ESQUIRE
POST OFFICE BOX 172238
TAMPA, FLORIDA 33672
(813) 223-7803
FLORIDA BAR NO. 022873

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Elizabeth D. Seward, Esquire, U.S. Department of Justice, Tax Division, Court of Federal Claims Section, Post Office Box 26, Ben Franklin Station, Washington, D.C. 20044 and Edward T. Perelmuter, Attorney, Appellate Section, Department of Justice, Tax Division Appellate Section, Post Office Box 502, Washington, DC 20044, on this 31st day of December, 1998.

GEORGE W. ERICKSEN, ESQUIRE

In the United States Court of Federal Claims

No. 95-493 'I1
(Judge Wiese)

ESTATE OF CLYDE L. RINALDI,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

RESPONSE OF THE UNITED STATES TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RELIEF UNDER RCFC 60(b)(l)

Defendant is in receipt of plaintiff's motion to strike defendant's response to plaintiffs motion for relief under RCFC 60(b)(1), served on December 31, 1998. Plaintiffs motion is frivolous and should be denied forthwith.

Defendant responded to plaintiffs motion for relief as it is permitted to do under Rule 83.2(a). Plaintiff's motion for relief does not even mention the Rule 60.1 remand provision alluded to in its motion to strike, which, in any event, defendant would strongly oppose as wholly inappropriate. As explained in our response; plaintiff's latter-day QTIP election is out of time, both because it filed an irrevocable QTI2P election on its return, and because the statute of limitations for filing a claim for refund of its estate taxes has long since expired. See § 6511(a)(l), providing that claims for refund must be filed within the later of three years of the date the return in question was filed or two years from the date of the tax. Plaintiff's estate tax return was filed in 1989, while its last payment of estate tax was made in 1992. (See DPF 19, 23, and record references therein.) Further, it is plaintiff, not defendant, who has asked the Court for judicial relief. It is nonsensical for plaintiff to seek judicial relief in its motion and move to strike our response to that motion on the ground that judicial action is inappropriate.

[1] In essence, plaintiff's motion is merely additional argument in support of its pending Rule 60(b) motion for relief.

The separation of powers doctrine simply has no application here.[1]

Respectfully submitted,

ELIZABETH D. SEWARD
Attorney of Record
U.S. Department of Justice
Tax Division
Court of Federal Claims Section
Post Office Box 26
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6508

LORETTA C. ARGRETT
Assistant Attorney General
MILDRED L. SEIDMAN
Chief, Court of Federal Claims
Section

STEVEN I. FRAHM
Assistant Chief

Of counsel

CERTIFICATE OF SERVICE

I certify that service of the foregoing document has been made on opposing counsel this 6th day of January, 1999, by mailing a copy thereof, in a postage prepaid envelope, to the following address:

George W. Ericksen, Esquire
P.O. Box 172238
Tampa, Florida 33672

U.S. Department of Justice
Tax Division
Court of Federal Claims Section
Post Office Box 26
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6440

In the United States Court of Federal Claims

ORDER

ESTATE OF CLYDE L. RINALDI

v. No. 95-493 T

THE UNITED STATES

Washington D.C., January 12, 1999

Please take notice that in the above case there has been entered this day on plaintiff's motion, filed December 7, 1998, for relief of judgment and further relief under the provisions of Rule 60(b)(1),

the following Order:

Denied an the basis of the reasons presented in defendants response of December 18, 1998.

John P. Wiese, Judge

In the United States Court of Appeals for the Federal Circuit

No. 98-5064

ESTATE OF CLYDE L. RINALDI,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT
OF FEDERAL CLAIMS IN 95-CV-493
JUDGE JOHN P. WIESE

STATEMENT OF THE ISSUE

Whether the Court of Federal Claims correctly held that the taxpayer estate was not entitled to a marital deduction for the value of shares of stock bequeathed to a marital trust under the decedent's will, because the property did not constitute qualified terminable interest property under Section 2056 (b) (7) Of the Internal Revenue Code.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-5064

ESTATE OF CLYDE L. RINALDI,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: November 13, 1998

Before RICH, RADER, and SCHALL, Circuit Judges.

PER CURIAM.

DECISION

The Estate of Clyde L. Rinaldi appeals from the decision of the United States Court of Federal Claims granting summary judgment in favor of the government Estate of Rinaldi v. United States, No. 95-494T. On the basis of the thorough and well-reasoned opinion of the Court of Federal Claims, we affirm.

United States Court of Appeals for the Federal Circuit

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 11/13/98

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) in favor of the Respondent(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

JAN HORBALY
Clerk

cc: GEORGE W. ERICKSEN
EDWARD T. PERELMUTER

ESTATE OF RINALDI V US, 98-5064
CFC-95CV-493

United States Court of Appeals for the Federal Circuit

98-5064

ESTATE OF CLYDE L. RINALDI,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 95-CV-493

This CAUSE having been heard and considered. it is ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED NOV 13, 1998

Jan Horbaly, Clerk

ISSUED AS A MANDATE: JANUARY 4, 1999

Treasury Decision 8779, filed with the Federal Register on August 18, 1998., I.R.B. 1998-36, 11

[Code Secs. 2044 and 2056]

Estate tax: Marital deduction: Qualified terminable interest property: Election.–Amendments to Reg. §§620.2044-1, 20.2056(b)-7 and 20.2056(b)-10, regarding the qualifying income interest for life requirement with respect to qualified terminable interest property (QTIP), have been adopted. In order to conform the estate tax regulations to recent court decisions, the amended regulations clarify that an interest in property is eligible for QTIP treatment if the income interest is contingent upon the executor's election and if that portion of the property for which no election is made will pass to or for the benefit of beneficiaries other than the surviving spouse. Estates of decedents whose estate tax returns were due on or before February 18, 1997, are granted extensions of time to make the QTIP election if: (l)the period of limitations on filing a claim for credit or refund has not expired; and (2) the estate submits a statement providing that the surviving spouse's estate will include the value of the property for which the QTIP election is being made, pursuant to Code Sec. 2044 Reg. §§20.2044-1T, 20.2056(b)-7T and 20.2056(b)-10T are removed BACK REFERENCES: ¶5910, ¶6825 and ¶6885.

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY. This document contains final regulations amending the estate tax marital deduction regulations. The amendments are made to conform the estate tax regulations to recent court decisions in *Estate of Clayton v. Commissioner*, 976 F.2d 1488 (5th Cir. 1992), rev'g 97 T.C. 327 (1 991); *Estate of Robertson v. Commissioner*, 1 5 F.3d 779 (8th Cir. 1994), rev'g 98 T.C. 678 (1992); *Estate of Spencer v. Commissioner*, 43 F.3d 226 (6th Cir. 1995), rev'g T.C. Memo. 1992-579 and *Estate of Clack v. Commissioner*, 106 T.C. 131 (1996). The amendments affect estates of decedents electing the marital deduction for qualified terminable interest property (QTIP) and the estates of the surviving spouses of such decedents.

DATES: These regulations are effective August 19, 1998.

FOR FURTHER INFORMATION CONTACT: Susan B. Hurwitz, (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information in these final regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned control number 1545-1612.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

The collection of information in this regulation is in §20.2056(b)-7(d)(3)(ii). This information is required to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property election under section 2056(b)(7)(8)(v). This information will be used to inform the IRS of the affected estates that are electing to obtain the relief granted in the regulation. The collection of information is mandatory for those estates that seek relief. The likely respondents are individuals representing estates.

Comments concerning the collection of information should be directed to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to

the Internal Revenue Service, Attention: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Any such comments should be submitted not later than October 19, 1998. Comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility.

The accuracy of the estimated burden associated with the collection of information (see below);

How to enhance the quality, utility, and clarity of the information collected;

How to minimize the burden of complying with the collection of information, including the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Estimates of the reporting burden in these final regulations will be reflected in the burden of Form 843 (Claim for Refund and Request for Abatement) and Form 706 (Estate Tax Return) or 706NA (Estate Tax Return for Nonresident Noncitizens).

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On March 1, 1994, the IRS published final estate and gift tax regulations (26 CFR part 20 and part 25) under sections 2044, 2056, 2207A, 2519, 2523, and 6019 of the Internal Revenue Code (Code) in the **Federal Register** (59 FR 9642). At that time, §20.2056(b)7(d)(3) provided that an income interest (or life estate) that is contingent upon the executor's election under section 2056(b)(7)(B)(v) (the QTIP election) is not a qualifying income interest for life.

On February 18, 1997, temporary regulations (TD 8714) amending the existing final estate tax regulations relating to the marital deduction for qualified terminable interest property (QTIP) were published in the **Federal Register** (62 FR 7156). A notice of proposed rulemaking (REG-209830-96) cross-referencing the temporary regulations was published in the **Federal Register** (62 FR 7188) for the same day.

The temporary regulations provide that an income interest for life (or

life estate) that is contingent upon the executor's QTIP election, will not, because of the contingency, fail to be a qualifying income interest for life.

Written comments responding to the notice of proposed rulemaking were received. A public hearing was held on June 3, 1997. After consideration of all the comments, the proposed regulations under sections 2044 and 2056 are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed.

Explanation of Revisions and Summary of Comments

Under section 2056(b)(7)(B)(ii), the surviving spouse has a qualifying income interest for life in property which passes from the decedent if (1) the surviving spouse is entitled to all of the income from the property, payable at least annually (or has a usufruct interest for life in the property), and (2) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Commentators suggested that the regulation, based on the case law, should specifically provide that as a result of the executor's election over a portion of the property, in cases where the unelected portion of the property passes to a beneficiary other than the surviving spouse, the executor will not be considered to have a power to appoint any part of the property to any person other than the surviving spouse.

The final regulation is clarified to provide that an interest in property is eligible for treatment as qualified terminable interest property if the income interest is contingent upon the executor's election and if that portion of the property for which no election is made will pass to or for the benefit of beneficiaries other than the surviving spouse. Two examples provided in the temporary regulations have been revised in the final regulations to conform to this clarification.

Comments were also received regarding the effective date of the temporary regulations. It was suggested that relief should be made available for estates of decedents that did not make the QTIP election on their estate tax returns because the surviving spouse's income interest in the property was contingent upon the election or because the nonelected portion of the property was to pass to a beneficiary other than the surviving spouse. Accordingly, the final regulations provide that estates of decedents whose estate tax returns were due on or before February 18, 1997, are granted an

extension of time to make the QTIP election if: (1) the period of limitations on filing a claim for credit or refund under section 6511(a) has not expired; and (2) the estate submits a statement providing that, pursuant to section 2044, the surviving spouse's gross estate will include the value, at the date of the surviving spouse's death, of the property for which the QTIP election is being made. The statement must be signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased).

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Susan B. Hurwitz, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.